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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
Petitioners

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit incorrectly decided that the damages, if any, available to survivors of a victim of a fatal recreational boating accident which occurred in navigable territorial waters are determined under state law rather than according to the general federal maritime cause of action created by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

2. If the question presented above is decided affirmatively, petitioners also request that this Court decide the questions originally certified to the Third Circuit, to wit, whether, pursuant to the general maritime death action, respondents may recover: (1) damages for loss of society; (2) damages for lost future earnings; and/or (3) punitive damages.

PARTIES TO PROCEEDINGS BELOW

Petitioners/Defendants Below

Yamaha Motor Corporation, U.S.A. ("YMUS") was incorporated in California in 1976. Its principal place of business is 6555 Katella Avenue, Cypress, CA 90630. YMUS markets and distributes Yamaha motorized products including motorcycles, snowmobiles, generators, scooters, all-terrain vehicles, personal watercraft, outboard motors and golf cars.

Yamaha Motor Company, Ltd. ("YMC") was incorporated in Japan in 1955. Its principal place of business is 2500 Shingai, Iwata-Shi, Shizuoka-Ken, Japan. YMC manufactures motorcycles, all-terrain vehicles, boats, personal watercraft, snowmobiles, go-karts, generators and golf cars. YMC owns 100% of the stock of YMUS.

Respondents/Plaintiffs Below

Respondents, Lucien B. Calhoun and Robin L. Calhoun, are the parents of Natalie K. Calhoun, deceased, and are also the administrators of her estate.

Other Parties/Defendants Below

Palmas Del Mar Company; Palmas Del Mar, Inc.; Palmas Yacht Club, Inc.; Maxxam Properties, Inc.; ABC Corporation; XYZ Partnership(s); Candelero Hotel Corporation; and Marina De Palmas Shipyard, Inc. were named as defendants in the suit below. However, these parties were dismissed without prejudice from this action by stipulation approved by the district court below on February 12, 1991. App. 86a.

RULE 29.1 LISTING

YAMAHA CORPORATION

Subsidiaries and Affiliates

- Yamaha Motor Company, Ltd.
- Yamaha Motor Corporation, U.S.A.
- Yamaha Motor Manufacturing Corporation of America (incorporated in the State of Georgia)

While there are other Yamaha subsidiaries and affiliates, they are wholly-owned and/or not publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. ("Yamaha") respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on November 2, 1994. Petitioners' request for rehearing with suggestion for rehearing in banc was denied on December 7, 1994.

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. 1a and 44a), as amended (App. 47a), is reported at 40 F.3d 622 (CA3 1994). The court of appeals' order upon denial of a petition for rehearing with suggestion for rehearing in banc (App. 49a) is reported at 1994 U.S. App. LEXIS 34487 (CA3 Dec. 7, 1994). The memorandum opinion and orders of the district court below (App. 51a) are reported at 1993 WL

216238 (E.D. Pa., June 22, 1993).[1] The combined order denying Yamaha's motion for reconsideration and certifying the issue for immediate interlocutory appeal (App. 73a) is reported at 1993 U.S. Dist. LEXIS 9047, 1993 WL 197319 (E.D. Pa., June 2, 1993). The district court's order amending certification to include plaintiffs' questions (App. 78a) is reported at 1993 U.S. Dist. LEXIS 8267, 1993 WL 218833 (E.D. Pa., June 21, 1993). The court of appeal's orders granting permission for interlocutory appeal pursuant to Fed. R. App. P. 5(a) and consolidating the appeals are not reported, but are included in the appendix hereto at 84a.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1994 (App. 44a) and a timely petition for rehearing was denied on December 7, 1994. App. 49a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).[2]

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1. The district court opinion originally recited from the bench on December 24, 1992 was not formally issued by the court in written form until June 17, 1993.

2. The Supreme Court has jurisdiction to review interlocutory judgments of federal courts of appeal pursuant to 28 U.S.C. § 1254(1), and will do so particularly where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and would also otherwise qualify as a basis for certiorari. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916). A judgment rendered pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), already incorporates within the lower court standard some of the key criteria required by the Supreme Court in deciding whether to review such a judgment by virtue of the Act's reference to such factors as whether there is "a controlling question of law as to which there is substantial ground for difference of opinion" and the requirement for material advancement of "the ultimate termination of the litigation."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. art. III, § 2:

The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .

28 U.S.C. § 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

I. Factual Background

On July 6, 1989, Natalie Calhoun, the 12-year-old daughter of respondents Lucien B. and Robin L. Calhoun, was killed when the rented personal watercraft she was operating collided with a vessel anchored in navigable territorial waters off the coast of Puerto Rico.[3] The personal watercraft was a "WaveJammer" model manufactured by Yamaha Motor Company, Ltd. and distributed by Yamaha Motor Corporation, U.S.A. Although they presumably incurred funeral expenses, the Calhouns have not alleged they were in any way financially dependent on their daughter.

Mr. and Mrs. Calhoun, individually and in their capacities as administrators of their daughter's estate, sued Yamaha in the United States District Court for the Eastern District of

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3. "Territorial seas," with respect to the United States, are defined as "the waters within the belt, three (3) nautical miles wide adjacent to its coast and seaward of the territorial sea baseline." 33 C.F.R., Ch. 1, § 2.05-5(a) (1988). United States maritime law will be applied to territorial waters surrounding Puerto Rico since by virtue of the Federal Regulations Act, 48 U.S.C. § 749, Congress placed under the control of the Commonwealth of Puerto Rico its harbor areas and navigable bodies of water. In that same statute, it is stated that all laws of the United States for the protection and improvement of navigable waters of the United States and the preservation of navigation and commerce shall apply to Puerto Rico and its waters. *Caraballo v. Autoridad de Los Puertos de Puerto Rico,* 388 F. Supp. 308 (D.P.R. 1974).

Pennsylvania[4] seeking recovery under the Pennsylvania wrongful death[5] and survival[6] statutes. Federal jurisdiction was founded on both diversity of citizenship[7] and admiralty.[8] The Calhouns have alleged theories of negligence, strict liability, and breach of implied warranties, and seek recovery for damages including lost future earnings, loss of society, loss of support and services, funeral expenses and punitive damages.

II. Proceedings Below

On November 27, 1991, Yamaha moved for partial summary judgment, asserting that damages recoverable, if any, were to be determined under the federal general maritime cause of action announced by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), rather than the Pennsylvania remedial statutes referenced above. Because the accident in question occurred on navigable waters and resulted from traditional maritime activity, and since the facts of this case did not bring it within the parameters of any of the maritime statutory remedies, Yamaha argued that all relevant matters must therefore be decided pursuant to the federal common law of admiralty. Yamaha further asserted that the measure of damages recoverable, if any, must also be determined in accordance with recognized principles of general maritime law, and that under those principles plaintiffs were not entitled to recover lost future wages, loss of society or punitive damages. In its decision on Yamaha's motion, the district court below held that (1) the federal common law of admiralty governed the Calhouns' wrongful death and survival claims;[9] (2) the general maritime death action, announced in *Moragne,* displaced Pennsylvania wrongful death and survival

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4. Lucien and Robin Calhoun are residents of the Commonwealth of Pennsylvania. Natalie Calhoun's estate is also being administered in Pennsylvania.

5. 42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1994).

6. 42 Pa. Cons. Stat. Ann. § 8302 (1982 & Supp. 1994).

7. 28 U.S.C. § 1332 (1993).

8. 28 U.S.C. § 1333 (1993).

9. *See* March 19, 1992 district court order granting summary judgment to the extent plaintiffs' claims are to be determined under the law of admiralty. App. 51a.

statutes;[10] and (3) under this federal maritime common law remedy, lost future wages and punitive damages could not be awarded, but loss of society and loss of support and services were compensable.[11]

After rejecting Yamaha's motion for reconsideration, the district court agreed to certify the question of whether loss of society was a proper element of damages under the general maritime death action to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). App. 73a. The Calhouns then requested that the district court amend its certification order to add the questions of whether future wage loss and punitive damages were recoverable. The district court agreed and certified the following questions to the court of appeals (App. 78a):

> The questions of law certified to the Court of Appeals are whether, pursuant to [a federal] maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

By order dated July 16, 1993 and pursuant to Fed. R. App. P. 5(a), the court of appeals granted permission for interlocutory appeal on these related issues. App. 84a. The appeals were consolidated, briefs submitted and oral argument took place on April 13, 1994 before Judges Becker, Mansmann and Scirica. The panel's opinion and judgment were issued on November 2, 1994. App. 1a and 44a.

The district court's statement of certification involved the measure of damages recoverable in a federal maritime death action. On appeal, however, the Third Circuit decided the answers to the certified questions were contingent upon a reexamination of the premise underlying the district court's

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10. *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). App. 65a-66a.

11. *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). App. 67a, 71a and 72a.

decision, i.e., that the right of action recognized in *Moragne* and its progeny governs the case of a recreational boater killed in territorial waters to the exclusion of state law. Since the court of appeals concluded that the *Moragne* remedy did not apply to such cases, the questions originally certified by the district court were never reached. App. 4a. Instead, having dismissed the *Moragne* remedy, the court of appeals held there was no body of federal law applicable to the death of a recreational boater in territorial waters, and that state law should therefore apply. App. 4a. The Third Circuit based its decision primarily on the preemption analysis articulated in *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), and its progeny (App. 9a), and also relied heavily upon its interpretation of *Off-Shore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986), notably the discussion of Section 7 of the Death on the High Seas Act, for its holding that Congress affirmatively intended to preserve state remedies for maritime deaths which occur within territorial waters. App. 37a and 38a.

Accordingly, the district court order granting Yamaha partial summary judgment and precluding recovery for lost future wages and punitive damages was reversed, and the order denying partial summary judgment and permitting loss of society damages was affirmed. App. 4a and 43a. The case was remanded to the district court for further proceedings, including a preliminary determination of whether plaintiffs' claims should be governed by the law of Pennsylvania or Puerto Rico. App. 4a and 42a.

REASONS FOR GRANTING THE PETITION

Petitioners seek review by this Court because the decision of the court of appeals is in direct conflict with the recent Second Circuit decision in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.,* 4 F.3d 1084 (CA2 1993), *cert. denied,* 114 S. Ct. 1016 (1994), as well as previous decisions of the Fifth, Sixth, Eighth and Ninth Circuit Courts of Appeal. The decision is also inconsistent with both the express holdings and the implied intent of the decisions of this Court in the quarter century since *Moragne.*

The need for further guidance from this Court is great. The implications of this case are far-reaching, involving actual and potential litigants in both commercial and recreational maritime settings. Unless the decision of the court of appeals is reviewed, litigants in substantially similar maritime cases across the country will be exposed to distinct and conflicting laws involving issues of national significance. Actions in the Second, Fifth, Sixth, Eighth and Ninth Circuits will proceed under *Moragne* and federal maritime common law. Courts within the Third Circuit will allow recovery to the degree permissible under the laws of Pennsylvania, New Jersey, Delaware or the U.S. Virgin Islands. The courts of the other circuits will presumably be free to choose between the two rules. The impact of this conflict on the fundamental concept of maritime uniformity is both obvious and acute.

I. The Decision Of The Court Of Appeals Is In Conflict With Decisions In The Second, Fifth, Sixth, Eighth And Ninth Circuits.

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court announced the creation of a federal maritime right of action for deaths occurring in the nation's territorial waters. Although the specific facts of *Moragne* involved the death of a longshoreman allegedly due to an unseaworthy vessel, the decision was broader, establishing a general remedy for maritime wrongful death in territorial waters.

Since federal maritime legislation is by its terms inapplicable to nonseamen killed in territorial waters,[12] recovery prior to *Moragne* had depended on whether and the degree to

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12. The Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761-68, provides a remedy for civilian deaths that occur at sea more than a marine league (three nautical miles or 3.45 land miles) from the shore of any state, district, territory or dependency of the United States. The Merchant Marine Act of 1920 (also known as the "Jones Act"), 46 U.S.C. § 688, extends to seamen the protections of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 1, *et seq.* In 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, which granted longshoremen and harbor workers the right to receive workers' compensation benefits from their employers for accidental injury or death arising out of their employment. Congress amended the LHWCA in 1972, revoking the longshoremen's right to bring an action for unseaworthi-

which the law of the state adjacent to the accident recognized an action for maritime wrongful death. The potential therefore existed for as many different remedies as there would be states addressing deaths on their territorial waters. In order to eliminate this disparity, the *Moragne* Court announced a uniform national remedy that was intended to supplant application of individual state laws:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both the 1920 Acts [referring to DOHSA and the Jones Act] but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with and operating uniformly in, the whole country.' *The Lottawanna,* 21 Wall. 558, 575 (1874).

Id., 398 U.S. at 401-02 (citations and footnote omitted).[13]

Moragne did not involve the death of a recreational boater. However, in the quarter century since it was decided, the Supreme Court has steadily and unequivocally expanded the realm of maritime common law to encompass recreational boating. In *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982), this Court held that an accident between two recreational vessels on navigable territorial waters bears sufficient relationship to traditional maritime activity to fall within the scope of federal admiralty jurisdiction. *Id.* at 669. In *Sisson v. Ruby,* 497 U.S. 358 (1990), this Court similarly determined

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NOTES *(Continued)*

ness, but permitting a statutory cause of action for negligence against a vessel, including a remedy for wrongful death. 33 U.S.C. 905(b).

13. Thomas Schoenbaum also acknowledges federal preemption of state law remedies in his authoritative treatise. *Admiralty and Maritime Law,* § 8-3 (2d ed. 1994). Discussing the effect of the *Moragne* wrongful death action and referencing the above-quoted portion of the opinion, he states: "Thus the new *Moragne* wrongful death action preempts state wrongful [death] statutes within the area of admiralty jurisdiction." *Id.* at 742 (*citations omitted*).

that a case involving a fire on board a vessel docked at a marina is sufficiently related to traditional maritime activity to meet the requirements of admiralty jurisdiction. With the exercise of admiralty jurisdiction comes the application of the full body of substantive admiralty law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360 (1959); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) (*citing Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 254 (1972)).

It is of more than casual significance that there is not even one word of dicta in either the *Foremost* or the *Sisson* decisions to suggest the Court intended recreational boaters to be treated differently than any other maritime litigants. In both cases the Supreme Court held that federal admiralty jurisdiction would apply, thus invoking substantive maritime law, which at that time clearly encompassed the *Moragne* general wrongful death action. Moreover, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court expressly declined to limit *Moragne* to its specific facts, holding instead that any maritime injury not specifically covered under the federal statutes would fall within the general federal maritime remedy. This Court also explained that, in the context of *Miles*, the *Moragne* decision extended the DOHSA wrongful death remedy to territorial waters (*Id.*, 498 U.S. at 29) and that such extension "will further, rather than hinder, 'uniformity in the exercise of maritime jurisdiction'" *Id.* at 29 (*citing Moragne*, 398 U.S. at 396 n.12).

It was against this backdrop that the Third Circuit reached its decision in this case and the United States Court of Appeals for the Second Circuit decided *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994), an action factually and legally indistinguishable from the case at bar. Scott Wahlstrom was killed when his rented Kawasaki brand personal watercraft collided with a 20-foot powerboat on the Thames River, a navigable waterway located in Connecticut. The decedent's parents sued Kawasaki under the Connecticut Products Liability Act and the Connecticut Unfair Trade Practices Act, basing federal jurisdiction on diversity of citizenship and seeking

compensatory damages, punitive damages and attorneys' fees. Kawasaki moved for summary judgment, arguing that the action was governed solely by federal maritime law. The district court granted Kawasaki's motion, dismissing the plaintiffs' state law claims. On appeal, the Wahlstroms conceded that the case fell within the admiralty jurisdiction of the federal courts, but argued that federal maritime law did not preclude application of individual state wrongful death statutes, and thus that Connecticut products liability and wrongful death laws should govern their action. In the alternative, the Wahlstroms argued that if the court found federal maritime law governed, the court should look to the Connecticut wrongful death provisions in fashioning the federal remedy. The Second Circuit rejected both of these assertions. Recognizing the importance of uniformity in maritime law, the Second Circuit held that the wrongful death cause of action under the general maritime law necessarily excludes the peculiarities of individual state remedial statutes. *Id.* at 1089.

Premising its holding on Supreme Court precedent, "which over the past thirty-three years [sic], has transformed the face of the federal maritime wrongful death remedy," the Second Circuit held that federal maritime law, whether or not in conflict with an individual state's law, precludes application of state law and governs all actions for wrongful death and survival occurring in navigable territorial waters falling under the admiralty jurisdiction of the federal courts. *Id.* at 1087-89. Having reached opposite conclusions on this important issue of maritime law, the Second and Third Circuits are thus in direct conflict.[14] And, since this Court has already denied cer-

14. The Third Circuit panel which issued the *Calhoun* opinion was well aware of the *Wahlstrom* opinion at the time it was considering these matters. While the *Calhoun* opinion does not discuss the Second Circuit's decision in detail, the court of appeals was clearly aware of the Second Circuit's position as well as contrary decisions in other circuits and district courts. App. 31, 25 and 40 n.42. The transcript of the oral argument also reveals direct recognition by the court of appeals of the contrary holding by the Second Circuit and the potential for this case to be argued before the Supreme Court. App. 90a and 100a.

tiorari in the *Wahlstrom* case, it is even more imperative that this petition be granted in order to avoid further conflict and confusion.

The decision of the court of appeals also conflicts with the decisions of other circuits in cases which, while not factually as similar as *Wahlstrom*, are nevertheless legally indistinguishable. *See, e.g., Walker v. Braus*, 995 F.2d 77 (CA5 1993) (recreational boating collision on state inland waterway, federal maritime law will determine recovery for wrongful death); *Kelly v. Panama Canal Com'n*, 26 F.3d 597 (CA5 1994) (recreational boating accident on Panama Canal, general maritime law will apply to death claim); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988) (recreational boat capsized in Lake Michigan, survivors' claims to be determined under federal maritime law, not state law), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903 (CA8 1972) (survey boat capsized on Red River in Arkansas, court recognized general maritime death action, not state remedial statutes); *Sutton v. Earles*, 26 F.3d 903 (CA9 1994) (collision between pleasure boat and Navy buoy, applicable substantive law for death actions is general maritime law).[15] *See also*

15. In addition to the courts of appeal noted above, numerous federal district and state supreme courts have also held that federal maritime law will displace state law in the civilian/recreational maritime death context. *See, e.g., Gilmore v. Witschorek*, 411 F. Supp. 491 (E.D. Ill. 1976) (pleasure boat collision on navigable waters, *Moragne* overruled longstanding doctrine of applying state wrongful death statutes to maritime claims); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987) (pleasure boat collision with bridge results in death, general maritime death action precludes state remedial statutes in territorial waters); *Estate of Fajardo v. Maersk Line Agency, Inc.*, 1988 WL 168532 (D. Md., Nov. 30, 1988) (unreported) (drowning death of minor child caused by passing ship's wake, claim determined under federal maritime law, not state law); *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.) (civilian crushed to death between boat and dock, general maritime law preempts state causes of actions and remedies consistent with longstanding desire of Congress and judiciary to achieve uniformity in exercise of admiralty jurisdiction and pursuant to United States Constitution), *cert. denied*, 502 U.S. 908 (1991); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992) (death resulting from collision between two personal watercraft, federal maritime law,

Barbe v. Drummond, 507 F.2d 794 (CA1 1974) (DOHSA action involving recreational boat, court recognized federal maritime survival action analogous to *Moragne* wrongful death action); *Greene v. Vantage S.S. Corp.,* 466 F.2d 159 (CA4 1972) (general federal maritime law applies to death of longshoreman on territorial waters); *St. Hilaire Moye v. Henderson,* 496 F.2d 973 (CA8), *cert. denied,* 419 U.S. 884 (1974) (recreational boat accident on Arkansas River, federal maritime law preempts application of state law); *Mink v. Genmar Industries, Inc.,* 29 F.3d 1543 (CA11 1994) (maritime recreational injury case comes within admiralty jurisdiction, substantive federal maritime law applies, including uniform three-year statute of limitations for maritime torts, 46 U.S.C.A. § 763a (Supp. 1993)).

In its opinion, the Third Circuit cited what it perceived as a split of authority among the circuits on the question of federal maritime displacement of state laws. App. 35a n.37. Even if this statement were correct, which Yamaha disputes, it would simply reinforce the need for certiorari to be granted herein. However, when the citations referenced by the court of appeals are examined, it is clear they do not support the position for which they are advanced, and in reality the *Calhoun* decision stands alone.

The court of appeals cited the First Circuit decision in *Lyon v. Ranger III,* 858 F.2d 22 (CA1 1988) (Breyer, J.), for the proposition that state statutes apply to maritime wrongful death actions where recreational boaters are killed in territo-

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NOTES *(Continued)*

not state remedial statutes, controls); *Lipworth v. Kawasaki Motors Corp., U.S.A.,* 592 So. 2d 1151 (Fla. Dist. Ct. App..) (federal maritime law, not state law, applies to "jet ski" collision death), *cert. denied,* 113 S. Ct. 465 (1992); *Choat v. Kawasaki Motors Corp.,* 1994 WL 221417 (Ala., May 27, 1994) (unreported) (swimmer killed by "jet ski" on navigable waters, with admiralty jurisdiction comes application of substantive maritime law.

The precedential impact of these cases is not insignificant. As the Court is no doubt aware, in maritime cases state courts and district courts hearing cases in diversity are required to apply substantive admiralty law. *Off-Shore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 906 (1953).

rial waters. App. 35a n.37 and 39a. With all due respect to the court below, this citation is plainly and simply wrong. As the opinion unequivocally notes, "*Lyon's* . . . estate brought this wrongful death action *under the general maritime law*, 28 U.S.C. § 1333 (1982); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-403, 90 S.Ct. 1772, 1785-89, 26 L.Ed.2d 339 (1970)." *Lyon*, 858 F.2d at 24 (*emphasis added*). Contrary to the assumption of the court below, *Lyon* was not decided under the Massachusetts wrongful death and survival statutes. Rather, *Lyon* was in fact a *Moragne* action, and the court looked to Massachusetts law only to decide whether the negligence of one party should be imputed to another. Moreover, even on this relatively minor point, the court applied Massachusetts law only after determining: (1) there was no conflicting federal law on point; and (2) Massachusetts law was generally consistent with nationwide jurisprudence on this issue. Applying a widely recognized common law tort concept to a maritime case in the absence of conflicting federal law, as was done in *Lyon*, is a far cry from the *Calhoun* court's utilization of an entire state compensation system to the exclusion of the uniform federal remedy.

The other cases cited in support by the court of appeals are equally unpersuasive. *Ellenwood v. Exxon Shipping, Inc.*, 984 F.2d 1270 (CA1), *cert. denied*, 113 S. Ct. 2987 (1993), involved a claim for employment discrimination, not death. Moreover, while applying state law in that case, the *Ellenwood* court specifically recognized the displacement of state law in the wrongful death context in light of the *Moragne* decision. *Ellenwood*, 984 F.2d at 1280. *Favorito v. Pannell*, 27 F.3d 716 (CA1 1994), was an action for personal injuries, not death, and *Marine Transportation Services Sea-Barge Group v. Python High Performance Marine Corp.*, 16 F.3d 1133 (CA11 1994), was a commercial action involving lost property.

As *Moragne* and the subsequent cases that have applied and interpreted it make clear, admiralty wrongful death claims arising within territorial waters are not decided under state law. Rather, where no federal statute is specifically applicable, the remedy is to be determined under a uniform system of federal common law, regardless of who is killed or where the

accident takes place. This result is not only consistent with the general policy of DOHSA and the Jones Act, but also effectuates "the constitutionally based principle that federal admiralty law should be a 'system of law co-extensive with, and operating uniformly in, the whole country.'" *Moragne*, 398 U.S. at 402 (*quoting The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1874)).

II. The Decision Of The Court Of Appeals Is Inconsistent With Both Express Holdings And The Intent Of This Court.

Because the precise issues raised in this petition have never been the subject of a direct opinion of this Court, the decision of the court of appeals cannot be said to be contrary to a specific Supreme Court decision. That is not to say, however, that this Court has never offered its guidance. In *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 777 S.W.2d 783 (Tex. Ct. App. 1989), an intermediate appellate court affirmed the decision of a Texas trial court to apply the Texas wrongful death and survival statutes to an action brought by the survivors of a civilian killed in territorial waters. This Court granted certiorari and, upon review, vacated and remanded the case to the Texas appellate court for review in light of *Sisson v. Ruby*, 497 U.S. 358 (1990), which applied federal maritime law to a case involving a fire on board a docked vessel.[16] Despite the specific direction of this Court, the Texas appellate court reaffirmed its earlier decision applying state law. 795 S.W.2d 870 (Tex. Ct. App. 1990). The Texas Supreme Court reversed this decision, however, holding not only that state law is preempted by federal maritime law, but that the failure to award damages consistent with maritime law is reversible error. 808 S.W.2d 61 (Tex. 1991). This Court then denied certiorari following the Texas Supreme Court's decision. 502 U.S. 908 (1991).

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16. *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 777 S.W.2d 783 (Tex. Ct. App. 1989), *vacated*, 497 U.S. 1020, *on remand*, 795 S.W.2d 870 (Tex. Ct. App. 1990), *rev'd*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991).

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court announced the creation of a federal death remedy applicable in the absence of a relevant federal maritime statute. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Sisson v. Ruby*, 497 U.S. 358 (1990), confirmed and reaffirmed that recreational boating is within the ambit of federal maritime jurisdiction. In *Texaco Refining & Marketing, Inc. v. Dau Van Tran*, 497 U.S. 1020 (1990), this Court vacated a decision of a Texas appellate court which had applied state law to a civilian death and remanded the case after specifically instructing the Texas court to reconsider its decision in light of *Sisson*. The decision of the Third Circuit in this case is plainly inconsistent with the intent of this line of Supreme Court authority, and is unsupported by any decision to the contrary. Moreover, the decision has even broader implications than its apparent rejection of *Moragne* in the context of civilian deaths on navigable, territorial waters. It represents a complete rejection of the precepts of this Court set forth in *Foremost* and *Sisson*, which recognized that recreational boating is within the ambit of maritime jurisdiction.

III. The Court Of Appeals' Decision Undermines The Fundamental Concept Of Maritime Uniformity.

In its opinion, the Third Circuit downplayed the importance of uniformity in maritime jurisprudence, stating that "although the cases often mention uniformity as a guiding principle, the Court's actions belie its importance. . . . We believe that the thrust of these cases suggests that the concept of uniformity has a good deal less weight than has been thought. . . ." (*citations and footnote omitted*). App. 26a-27a. However, the fact that admiralty jurisprudence has not yet successfully crafted a fully uniform and internally consistent system of maritime law for deaths which occur in territorial waters does not mean that the stated goal of uniformity is unimportant. Rather, it simply indicates that the goal has not yet been attained.

The recurrent theme of *Moragne* and the subsequent decisions interpreting it is that each and every party who brings an action for a maritime wrongful death should receive essentially the same substantive remedy. Regardless of

whether the decedent is a civilian or a seaman, whether the death occurs within territorial waters or on the high seas, or whether the claim is based on theories of negligence or unseaworthiness, each petitioner should receive similar redress from the courts. The Third Circuit's decision in the instant case is directly contrary to the prevailing current of maritime jurisprudence.

Uniformity in admiralty jurisdiction has its roots in Article III, Section 2 of the Constitution, wherein the federal judiciary was given admiralty and maritime jurisdiction. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959). The necessity of a uniform national approach to the exercise of this jurisdiction has been a pervasive theme of the decisions of this Court on the subject, beginning with *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In *Jensen*, the Court was asked to decide whether the application of the New York Workmen's Compensation Act to a case involving the death of a longshoreman in territorial waters was an unconstitutional intrusion on federal admiralty jurisdiction. The Court concluded this was indeed the case. *Jensen* established the principle that federal admiralty law governs maritime occurrences and that state law must yield to the required uniformity of the maritime law. While the Court has also recognized that the general maritime law is not a complete system, and there are gaps to be filled by analogy to federal statutes and/or adoption of state law concepts,[17] the goal of uniformity in admiralty does require careful analysis and respect.

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17. In the maritime law preemption analysis, the federal courts most frequently "borrow" the general common law rather than the law of any particular state because this promotes uniformity in the general maritime law. T. Schoenbaum, *Admiralty and Maritime Law*, § 4-4, p. 143 (2d ed. 1994) (*citing Marastro Compania Naviera S.A. v. Canadian Maritime Carriers, Ltd.*, 959 F.2d 49 (CA5 1992); *Connor v. Aerovox, Inc.*, 730 F.2d 835 (CA1 1984), *cert. denied*, 470 U.S. 1050 (1985); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986)).

As the district court below recognized, the evolution of maritime wrongful death law since *Moragne* has been toward a uniform cause of action, national in scope.

> If Professors Wright, Miller and Cooper[18] are correct [in stating that state wrongful death statutes will apply where maritime accidents fall within a marine league from shore] — and they almost always are — the plaintiffs in the case before this court would seem to have substantial ammunition in contending for the proposition that at least some categories of nonpecuniary damages can be asserted either under a wrongful death statute or a survival statute. The thrust, nonetheless, of the post-*Gaudet* cases, including *Tallentire,* seems to me to run not in direct holding but in jurisprudential approach contrary to the inference drawn by Professors Wright, Miller and Cooper. That is to say, the Supreme Court's post-*Gaudet* jurisprudence seems to me cumulatively to run against a conclusion that state statutes can of their own force have some share in defining what a cause of action may be which arises from a death in the navigable waters, whether on the high seas or on the territorial water, and without regard to whether the decedent is a seaman or a longshoreman on the one hand or a civilian on the other.
>
> * * *
>
> What I think is clear from Justice Stevens' identification of the two "national rules" [referring to *Mobil Oil v. Higginbotham,* 436 U.S. 618, 624 n.18 (1978)] is that the Court saw not merely the DOHSA claim but the *Gaudet* claim . . . as claims of national architecture . . . To that extent, I think *Mobil Oil* carried on what was essentially the central logic of *Moragne* and *Gaudet* themselves — the understanding that the Supreme Court was authorizing the creation of a federally judicially defined cause of action, one which possibly would draw on state law sources but not because state law sources held any direct primacy.

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18. 14 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3672, at 155 (1994).

* * *

> Justice O'Connor for the *Tallentire* majority [referring to 477 U.S. 207, 233] echoes Justice Stevens for the majority in *Mobil Oil* in recognizing that what is in balance is a national statutory claim on the high seas as against a national judicially created maritime action in the territorial waters.
>
> To recapitulate this portion of the opinion, my conclusion is that whatever recovery may be had for a death befalling someone who is not a seaman and not a longshoreman in territorial waters is dictated by a *national* and hence *uniform* federal maritime claim.

(Emphasis in original.) See December 24, 1992 District Court Bench Opinion, 1993 WL 216238 at ** 6-7 (unreported). App. 63a-65a.

Rejecting the district court's analysis, the court of appeals instead relied heavily upon a markedly different interpretation of *Off-Shore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986), notably the discussion of Section 7 of the Death on the High Seas Act, for its holding that Congress affirmatively intended to preserve state remedies for maritime deaths which occur within territorial waters. The Third Circuit expressed concern that if DOHSA is to provide by example the measure of damages for death actions under maritime common law, then *Moragne* in essence would give DOHSA a preclusive effect over state law in territorial waters when Congress explicitly intended DOHSA to have no such effect. App. 38a.

Tallentire did not affirmatively hold that state remedies may be applied to accidents occurring in territorial waters. Rather, *Tallentire* held that the DOHSA remedy could not be supplemented by state law in cases involving deaths on the high seas. The opinion itself states that the "savings to suitors" clause of 28 U.S.C. § 1333 permits state courts to adjudicate maritime actions, but "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by States conform to governing federal maritime standards." *Tallentire,* 477 U.S. at 223. *Tallentire* does

not say that the federal courts lack authority to preempt state law in territorial waters. Quite to the contrary, this Court in *Miles v. Apex Marine,* 498 U.S. 19, 29 (1990), expressly construed *Moragne* in the context of that case as extending the provisions of DOHSA to territorial waters. *Tallentire* simply notes that Congress, at the time it enacted DOHSA, declined to do so.

It is significant that the court of appeals' *Tallentire* analysis, as well as its references to Wright, Miller and Cooper, *Federal Practice and Procedure* (App. 24a and 39a), have been strongly challenged — both by the court below in this case and in the series of cases identified as *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran* (*see* n.16, *infra*) which were discussed previously in this petition. These very same arguments formed the basis for the second Texas Appellate Court decision wherein, even after being given specific direction by this Court, it reaffirmed its previous decision to apply state remedial statutes in place of the federal maritime remedy. Of course, this second decision by the appellate court was overturned by the Texas Supreme Court, after which this Court declined further review. If the Third Circuit's interpretation of *Tallentire* is correct, one would have expected the Supreme Court's treatment of *Dau Van Tran* to be precisely the opposite.

Evolution of the maritime common law death remedy is clearly an incremental process, and the simple fact that the journey is not complete does not authorize any court to disregard the steps which have already been taken. The court of appeals' decision threatens the established concept of maritime uniformity by directly interjecting individual state remedial statutes into the body of general maritime law rather than developing a uniform remedy, national in scope, for maritime wrongful death claims within territorial waters. If allowed to stand, this decision will plunge the courts back into the pre-*Moragne* jigsaw puzzle of disparate state law remedies.

IV. The Question Presented Is Important — The Decision Of The Third Circuit Will Have Immediate And Widespread Impact Beyond The Parameters Of This Case.

Petitioners and respondents are not the only parties affected by the Third Circuit's decision. The decision of the Third Circuit will have immediate and widespread impact on numerous recreational boaters nationwide, as well as on maritime commerce as the two activities interact within the nation's territorial waters. Under the authority of 46 U.S.C. § 6102, the Office of Navigation Safety & Waterway Services has been delegated the responsibility to collect, analyze and annually publish statistical information obtained from recreational boat casualty reporting systems. Within that office, the Auxiliary Boating and Consumer Affairs Division has Recreational Boating Safety Program responsibility. *Boating Statistics 1993, The 35th Annual Report*, contains the most recent, collated statistics on recreational boating accidents. The report is the result of the coordinated effort of the Coast Guard and those jurisdictions which have federally approved boat-numbering systems.[19]

In 1993, the Coast Guard received reports which reached a total of 6,335 recreational boating accidents, resulting in 800 fatalities and 3,559 injuries. In 1992, the Coast Guard received reports of 3,683 injuries and 816 fatalities involving recreational vessels. In 1991, those totals were 3,967 and 924, respectively. Although the annual number of recreational boating injuries and fatalities seem to be declining slightly, there are still a significant number of such occurrences per year. Each and every one of these incidents which results in a fatality may implicate the very same legal questions presented by this petition. So, too, may each incident in which a non-seaman is killed as a result of his or her interaction with a commercial vessel, whether as a passenger or otherwise. It is also likely, given the court of appeals' rejection of *Moragne* in the recreational death context, that it would also apply state

19. These include the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands and all states except Alaska.

law in maritime cases involving personal injury and property damage within territorial waters. It is clear that the impact of the decision of the court of appeals goes far beyond the parties to this appeal.

DAMAGES RECOVERABLE IN A GENERAL MARITIME ACTION

In the event the Court elects to hear this case, petitioners also request the Court to consider the questions originally certified to the court of appeals, to wit, whether, pursuant to the general maritime death action, respondents may recover: (1) damages for loss of society; (2) damages for lost future earnings; and (3) punitive damages. The *Moragne* Court left open for future determination the question of what elements of damage would be available. Nevertheless, because a number of questions remain open or in conflict 25 years later, petitioners request the Court's further guidance.

Much or all of the uncertainty regarding the elements of recovery under the general maritime action could be removed by the Court with a simple pronouncement regarding the scope of *Moragne* and the decisions which have followed it. For example, although *Moragne* involved the death of a longshoreman, the overwhelming majority of subsequent decisions has applied its remedy to any maritime death action not covered by one of the federal statutory enactments. As stated at length above, petitioners believe this result is entirely consistent with the line of post-*Moragne* cases including *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), *Sisson v. Ruby*, 497 U.S. 358 (1990), and *Texaco Refining & Marketing, Inc. v. Dau Van Tran*, 497 U.S. 1020 (1990). Nevertheless, since this Court has never specifically held that *Moragne* applies in the case of a civilian boater killed in territorial waters, the court of appeals found no direct constraint against the application of state law.

The absence of an unequivocal pronouncement from the Court has also created disparity even among those courts which have found *Moragne* to be applicable in similar cases. For example, in *Miles v. Apex Marine*, 498 U.S. 19 (1990), this Court determined that neither damages for loss of society nor

lost future wages was recoverable in an action for the death of a seaman. The *Wahlstrom* court and others have interpreted *Miles* to apply to any action for wrongful death in territorial waters, and precluded recovery of those damages. *See, e.g., Wahlstrom v. Kawasaki Heavy Indust., Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994).[20] Other courts, however, have focused on the fact that the decedent in *Miles* was a seaman and have therefore declined to apply *Miles* to civilian actions. *See, e.g., Sutton v. Earles*, 26 F.3d 903 (CA9 1994). The district court in this case chose the middle road: it applied *Miles* to the question of lost future wages because that holding was consistent with the majority of state rules (*Calhoun v. Yamaha Motor Corp., U.S.A.*, 1993 WL 216238 at ** 6-7 (E.D. Pa., June 22, 1993) (unreported) (App. 66a-67a)), but rejected that aspect of *Miles* which precluded recovery for loss of society by distinguishing the *Miles* decedent as a seaman. *Id.*, 1993 WL 216238 at ** 7-9. App. 68a-71a.

The same issue can also be expected to arise in the context of punitive damages. Many courts (including the district court below) have recently interpreted *Miles* to disfavor nonpecuniary elements of damage such as punitive damages. *See, e.g., Wahlstrom v. Kawasaki Heavy Indust., Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (CA6 1993); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 1993 WL 216238 at ** 9 (E.D. Pa., June 22, 1993) (App. 72a). However, absent express direction from this Court, the potential for conflict remains.

Petitioners therefore request this Court to decide not only whether the *Moragne* action extends to civilian deaths, but also the degree, if any, to which a civilian *Moragne* claim differs from that involving a seaman or longshoreman.

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20. Other courts had reached the same conclusion prior to *Miles*. *See, e.g., Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (CA5 1985), *cert. denied*, 475 U.S. 1019 (1986); *Estate of Fajardo v. Maersk Line Agency, Inc.*, 1988 WL 168532 (D. Md., Nov. 30, 1988) (unreported); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 14, 1995

APPENDIX

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Filed November 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and
Yamaha Motor Company, Ltd.,
Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased,

Appellants in No. 93-1737

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04295)

Argued: April 13, 1994

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges.

(Filed November 2, 1994)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

These consolidated interlocutory cross appeals before us pursuant to 28 U.S.C. § 1292(b) (1993) present an interesting and important question of maritime law: whether state wrongful death and survival statutes are displaced by a federal maritime rule of decision concerning the remedies available for the death of a recreational boater occurring within state territorial waters,[1] which are explicitly excluded from the reach of the Death on the High Seas Act, 46 U.S.C.A. § 761 (1975). The remedies at issue are loss of society, loss of support and services, loss of future earnings, and punitive damages.

This case arose when Natalie Calhoun, the twelve year old daughter of plaintiffs Lucien and Robin Calhoun, was killed in a boating accident in the waters off Puerto Rico. Natalie had been riding a "Wavejammer," a type of jet ski manufactured by Yamaha Motor Corporation, U.S.A., and its parent company, Yamaha Motor Company, Ltd. (collectively referred to as "Yamaha"). Plaintiffs sued Yamaha seeking recovery under the Pennsylvania wrongful death and survival statutes, 42 PA. CONS. STAT. ANN. §§ 8301-8302 (1982 & Supp. 1994). In granting partial summary judgment for Yamaha on the issue of available damages, the district court held that federal maritime law displaced both state remedies, and fashioned a federal common law rule applicable to cases involving the death of a non-seaman in territorial waters under which future earnings and punitive damages are not recoverable but damages for loss of society or support are. Each party sought certification to appeal the portion of the court's ruling that was unfavorable.

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1. "State territorial waters" refers to waters within the territorial limits of a state, as well as "the coastal waters less than three nautical miles from the shore of a state." William C. Brown, III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability*, 68 TUL. L. REV. 577, 581 (1994).

We do not reach the question whether the district court fashioned the proper federal common law remedy, however, because we conclude that the federal maritime law does not displace state wrongful death or survival statutes in this context. Rather, applying traditional admiralty choice of law principles, we hold that the appropriate rule of decision in this area should be supplied by state law. Our analysis of the Supreme Court's maritime wrongful death jurisprudence reveals that there is no federal substantive policy with which state wrongful death or survival statutes conflict here. In the absence of a clear conflict, state law rules of decision should apply. We will therefore affirm the district court's order denying Yamaha partial summary judgment, reverse the order granting Yamaha partial summary judgment, and remand the case for further proceedings consistent with this opinion. On remand, the district court will have to determine whether the plaintiffs' claims are governed by the laws of Pennsylvania or of Puerto Rico, and how the wrongful death and survival laws of those Commonwealths bear upon plaintiffs' damages.

I. FACTS, PROCEDURAL HISTORY, AND SCOPE OF THE INTERLOCUTORY APPEAL

On July 6, 1989, while vacationing with her parents at Palmas Del Mar Resort, Humacao, Puerto Rico, Natalie Calhoun rented a Yamaha "Wavejammer." While she was riding the "Wavejammer," Natalie slammed into a vessel anchored in the waters off the hotel frontage and was killed. At the time of her death, Natalie was twelve years old. Her parents, Lucien and Robin Calhoun, individually and in their capacities as administrators for the estate of their daughter, sued Yamaha in the District Court for the Eastern District of Pennsylvania seeking recovery under the Pennsylvania wrongful death statute, 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1994), and the Pennsylvania survival statute, 42 PA. CONS. STAT. ANN. § 8302 (1982). Their complaint invoked federal jurisdiction both on the basis of diversity of citizenship, 28 U.S.C.A. § 1332 (1993),[2] and

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2. The Calhouns are citizens of Pennsylvania; Yamaha Motor Corporation, U.S.A. is a California corporation, and Yamaha Motor Company, Ltd. is a Japanese corporation.

admiralty, 28 U.S.C.A. § 1333 (1993). The theories of recovery alleged in the complaint included negligence, strict liability, and breach of the implied warranties of merchantability and fitness for purpose. The complaint sought damages for lost future earnings, loss of society, loss of support and services, and funeral expenses. It also requested punitive damages.

On November 27, 1991, Yamaha moved for partial summary judgment asserting that the damages recoverable in the action, if any, were governed by the federal admiralty law, and that under that law the plaintiffs were not entitled to lost future wages, loss of society, loss of support and services, or punitive damages.[3] In its decision on the motion, the district court: (1) agreed with Yamaha that the federal common law of admiralty governed the Calhouns' wrongful death and survival actions; (2) held that the general maritime wrongful death cause of action recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970), displaced the Pennsylvania wrongful death and survival statutes and hence that any available remedy was a function of federal common law; and (3) held that under this federal common law remedy, lost future wages and punitive damages could not be awarded but loss of society and loss of support and services could be. The court therefore granted Yamaha's motion for summary judgment on the loss of future earnings and punitive damages, and denied its motion respecting the claims for loss of society and loss of support and services.

Yamaha moved the district court to certify for immediate interlocutory appeal, 28 U.S.C.A. § 1292(b) (1993), the question whether the plaintiffs should be able to recover damages for the loss of Natalie's society. Believing that the question was extremely close, the district court granted the motion and certified the issue to this court.[4] Plaintiffs then

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3. Yamaha has conceded that funeral expenses are compensable.

4. Section 1292(b) allows for immediate appeal of interlocutory orders (1) which involve a controlling question of law as to which there is substantial ground for difference of opinion and where an immediate appeal will materially advance the ultimate termination of the litigation and (2) which the Court of Appeals permits pursuant to Rule 5 of the Federal Rules of Appellate Procedure. *See* 28 U.S.C.A. § 1292(b); FED. R. APP. P. 5(a).

requested that the district court amend its certification order to add the question whether future earnings and punitive damages were recoverable. The district court agreed, and certified the following question to this Court:

> The questions of law certified to the Court of Appeals are whether, pursuant to [a federal] maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

Both parties petitioned for permission to appeal pursuant to Federal Rule of Appellate Procedure 5(a). We granted both petitions and consolidated the appeals. We have jurisdiction pursuant to 28 U.S.C.A. § 1292(b) (1993).

The district court's statement in the certification order is limited to the question of what damages are available under a *federal* maritime cause of action. On appeal, however, the parties have also (properly) briefed the question whether federal maritime law displaced state wrongful death and survival statutes. As will appear, the answer to the certified question depends in large part on the resolution of the displacement question. We presume that the district court intended this important question of displacement to be considered. But even if such were not the case, it would not affect our jurisdiction.

As provided in Section 1292(b), we have before us an appeal from the challenged order, not just the certified question. Section 1292(b) requires not that we answer the certified question, but that we decide an appeal from an interlocutory order. We therefore are not bound by the district court's formulation of the question, and may address any issue that is necessary to decide the appeal before us. *See In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). There the district court certified for appeal an order certifying a compulsory class under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(1)(B), but after taking jurisdiction we also reviewed the court's denial of certification under Rule 23(b)(3). *Id.* at 1002. *See also Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973) (stating that appeals court is not bound by district court's

statement of the issue on Section 1292(b) appeal), *cert. denied*, 419 U.S. 882, 95 S. Ct. 148 (1974); 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 110.25[1], at 300 (2d ed. 1994) ("[I]t is the *order* that is appealable, and not the controlling question identified by the district court. Thus, the court of appeals may address any issue necessary to decide the case before it.") (footnote omitted). The displacement question, which, in our view, is the critical question raised by this appeal, is therefore appropriately before us, and we turn immediately to it. The questions are ones of law and our review is plenary.

II. ADMIRALTY LAW AND DISPLACEMENT OF STATE LAW: GENERAL PRINCIPLES

As we have noted, the plaintiffs' complaint alleged federal jurisdiction on the basis of both diversity of citizenship, 28 U.S.C.A. § 1332 (1993), and admiralty, 28 U.S.C.A. § 1333 (1993).[5] The Supreme Court has instructed us that "[w]ith

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5. Since this accident involved the allision of a pleasure craft (the "Wavejammer") with another vessel on navigable waters, admiralty jurisdiction appears to have been appropriate. *See Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 2898 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677, 102 S. Ct. 2654, 2659 (1982) (collision of two boats, neither of which had ever been engaged in commercial maritime activity, and where site of accident was on waters seldom, if ever, used for commercial activity, was within admiralty jurisdiction). The Calhouns now argue that admiralty jurisdiction is inappropriate. Although they are entitled to so argue and have reserved their right to appeal that question from a final order, we doubt that the existence or non-existence of admiralty jurisdiction matters to the question of remedies. Even if this were solely a diversity case (in which event we would still have subject matter jurisdiction over these cross-appeals) or the parties were in state court, a federal maritime rule of decision applicable to the controversy would still displace a state rule that was in conflict. Although *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), states that there is no *general* federal common law, it is well settled that there are areas in which *specific* bodies of federal common law operate, particularly admiralty. And where a federal rule (either statutory or common law) supplies a rule of decision in a particular case, it applies regardless of the basis of jurisdiction. That is in part what the reverse-*Erie* doctrine tells us. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S. Ct. 2485, 2494 (1986).

admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 106 S. Ct. 2295, 2298-99 (1986). But knowing that substantive admiralty law applies does not really resolve the question whether federal or state law provides the relevant rule of decision. "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-75, 79 S. Ct. 468, 480 (1959). *See also American Dredging Co. v. Miller*, 114 S. Ct. 981, 987 (1994) (recognizing the continued vitality of this principle from *Romero*).

State and federal authorities jointly exercise regulatory authority over maritime matters. *Romero*, 358 U.S. at 375, 79 S. Ct. at 481. As a result, state law can, and often does, provide the relevant rule of decision in admiralty cases. *See, e.g., Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321, 75 S. Ct. 368, 374 (1955) (state law determines the effect of breach of warranty in a marine insurance policy). Indeed, "[i]n the field of . . . maritime torts, the National Government has left much regulatory power in the States." *Id.* at 313, 75 S. Ct. at 370.

Whether a state law may provide a rule of decision in an admiralty case depends on whether the state rule "conflicts" with the substantive principles of federal admiralty law. As Judge Aldisert explained in *Floyd v. Lykes Bros. S.S. Co.*, 844 F.2d 1044, 1047 (3d Cir. 1988), "state law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with [federal] maritime law." *See also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341, 93 S. Ct. 1590, 1600 (1973) (courts in admiralty cases may reach beyond maritime precedents and apply state law "absent a clear conflict with the federal law"); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S. Ct. 202, 205 (1953) ("[S]tates may sometimes supplement federal maritime policies . . . ."); *Sosebee v.*

Rath, 893 F.2d 54, 56-57 (3rd Cir. 1990) (maritime law preempts territorial attorney fees provision that directly conflicts with federal law). Thus, in the context of this case, the Pennsylvania wrongful death and survival statutes (or the Puerto Rico death and survival actions) may apply unless they conflict with a substantive rule of federal admiralty law.

We view this question as being quite similar, if not identical, to the preemption analysis articulated in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573 (1943), and its progeny, *see, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594, 93 S. Ct. 2389, 2398 (1973); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 99 S. Ct. 1448, 1458-59 (1979); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 n.3, 108 S. Ct. 2510, 2516 n.3 (1988); *O'Melveny & Myers v. F.D.I.C.*, 114 S. Ct. 2048, 2053 (1994). These cases recognize that there are areas of unique federal interest which are entirely governed by federal law, but where federal law nevertheless "borrows," *see Little Lake Misere*, 412 U.S. at 594, 93 S. Ct. at 2398, or "incorporates" or "adopts," *see Kimbell Foods*, 440 U.S. at 728-30, 99 S. Ct. at 1458-59, state law except where a significant conflict with federal policy exists.

While it is clear that under certain circumstances the general maritime law — including the wrongful death rule of *Moragne* — may incorporate state law as its rule of decision, the Supreme Court has begun to view the distinction between federal law incorporating state law as a rule of decision and state law operating of its own force as of theoretical importance only. *See O'Melveny & Myers*, 114 S. Ct. at 2048 ("In any event, knowing whether 'federal law governs' in the *Kimbell Foods* sense — a sense which includes federal adoption of state-law rules — does not much advance the ball. The issue in the present case is whether the [state] rule of decision is to be applied . . . or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is [the state's] sovereign power or federal adoption of [the state's] disposition.") (citation omitted). More precisely, although drawing such a distinction identifies the sovereign "power" being exercised, it does not have any real bearing on the

practical question whether the state law rule of decision will apply or be displaced. *See id.*[6] Thus, because it makes little practical difference as to whether the general maritime law has incorporated state law or whether state law provides a rule of decision of its own force, we simply refer to the problem as "displacement of state law."[7]

In admiralty law, determining whether federal maritime law conflicts with and thus displaces state law has proven to be extremely tricky. Although we are told time and again under maritime preemption doctrine that a conflict exists where state law prejudices the "characteristic features" of federal maritime law, or interferes with the "proper harmony and uniformity of that law," *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 529 (1917), the *Jensen* language is little more than a convenient slogan, providing little guidance on the question whether there is a conflict. *See American Dredging*, 114 S. Ct. at 991 (Stevens, J., concurring) ("The unhelpful abstractness of [the *Jensen* language] leaves us without a reliable compass for navigating maritime pre-emption problems."). Indeed, the lack of a clearly delineated conflicts inquiry in this area has been problematic. The Supreme Court has consistently

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6. *See also Boyle*, 487 U.S. at 507 n.3, 108 S. Ct. at 2516 n.3 ("We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. [Citing *Little Lake Misere* and *Kimbell Foods*]. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case."); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 977 & n.408 (1986) ("[The] distinction between state law applying directly and state law applying through federal reference is of dubious relevance.").

7. The correct analytic conclusion, we believe, is that admiralty law simply has not spoken to the factual situation of this case, *see infra* at typescript 28-32, 32-39, and that state laws accordingly apply of their own force. Were we to find federal admiralty law governing wrongful death and survival actions applicable to the death of a recreational boater occurring within state territorial waters, however, our analysis would likely lead us to hold that admiralty law either does not displace or adopts (or incorporates) state (or territorial) tort law. *See infra* at n.33.

struggled with setting the boundary between conflicting and non-conflicting state regulation in the area of maritime affairs, and has recently admitted,

> [i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence. Compare [*Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961)] (state law cannot require provision of maritime contract to be in writing), with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 [(1955)] (state law can determine effect of breach of warranty in marine insurance policy).

American Dredging, 114 S. Ct. at 987-88 (parallel citation omitted). *See also* GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY § 1-17, at 49 (2d ed. 1975) ("The concepts that have been fashioned for drawing [the line between state and federal law] are too vague, as we have seen, to ensure either predictability or wisdom in the line's actual drawing.").

In our view, however, the maritime preemption doctrine is not significantly different from the preemption doctrine applicable to non-maritime contexts. *See American Dredging*, 114 S. Ct. at 992 (Stevens, J., concurring); *Wilburn Boat Co.*, 348 U.S. at 324, 75 S. Ct. at 376 (Frankfurter, J., concurring) (maritime preemption analysis factors "are not unlike those involved when the question is whether a State, in the absence of congressional action, may regulate some matters even though aspects of interstate commerce are affected"); *id.* at 333, 75 S. Ct. at 381 (Reed, J., dissenting) ("Since Congress has power to make federal jurisdiction and legislation exclusive, the [preemption] situation in admiralty is somewhat analogous to that governing state action interfering with interstate commerce."). Therefore, resort to non-maritime preemption doctrine by way of analogy may help sharpen the focus of the inquiry.[8]

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8. The analogy is not perfect. In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct. 438 (1920), and *Washington v. W.C. Dawson & Co.*,

Stated succinctly, in the absence of an express statement by Congress (express preemption), (implied) preemption could occur either where Congress intended that federal law occupy the field (field preemption) or where there is an actual conflict between state and federal law such that: (1) compliance with both federal and state law is impossible; or (2) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See California v. ARC America Corp.*, 490 U.S. 93, 100-01, 109 S. Ct. 1661, 1665 (1989) (antitrust).[9]

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264 U.S. 219, 44 S. Ct. 302 (1924), the Supreme Court held that some state regulation of maritime matters, even where authorized by Congress, was precluded directly by the Constitution and the uniformity implications of its grant of federal maritime jurisdiction. *See Knickerbocker*, 253 U.S. at 163-64, 40 S. Ct. at 441; *W.C. Dawson & Co.*, 264 U.S. at 227-28, 44 S. Ct. at 302. In *Knickerbocker*, however, a congressional enactment authorizing state workers' compensation laws to govern maritime workers was held unconstitutional "because their provisions were held to modify or displace essential features of the substantive maritime law." *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124, 44 S. Ct. 274, 277 (1924). And in *W.C. Dawson & Co.*, a similar congressional act was invalidated because it "permit[ted] any state to alter the maritime law and thereby introduce conflicting requirements." *W.C. Dawson & Co.*, 264 U.S. at 228, 40 S. Ct. at 305. Although these cases have not been explicitly overruled by the Court, they rest on a strong nondelegation doctrine the likes of which has not been seen since the 1930s. At all events, by contrast to the situations in *Knickerbocker* and *W.C. Dawson*, as we detail below, here we discern no maritime law governing the plaintiffs' wrongful death and survival actions and no federal interest whose uniformity would be unconstitutionally impaired by application of state law.

9. The full *Jensen* preemption analysis is contained in the now famous passage stating that state legislation affecting maritime commerce is invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216, 37 S. Ct. at 529. This language seems to include the express preemption and implied preemption concepts of the non-maritime preemption doctrines. The language also seems to leave room for field preemption, although it does not appear to reference it as clearly. But as the First Circuit has recently recognized in *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 626-27 (1st Cir. 1994), in

In non-maritime cases, the determination whether there is a conflict between state and federal law in large part turns on the interpretation of federal statutes. *See Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304 (1966) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."). [10] In addition, non-maritime cases employ a presumption against preemption. That is, a court should construe a federal substantive rule in such a way that it does not conflict with a state rule in an area traditionally regulated by the states. *See ARC America*, 490 U.S. at 102, 109 S. Ct. at 1665. In admiralty law a similar presumption is incorporated in the case law by the requirement that there be a "clear conflict" before state laws are preempted. *See Askew*, 411 U.S. at 341, 93 S. Ct. at 1600; *cf. Ballard Shipping v. Beach Shellfish*, 32 F.3d 623, 630 (1st Cir. 1994) (stating that where a state remedy is aimed at a

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American Dredging, 114 S. Ct. at 987, the Supreme Court gave the *Jensen* "characteristic features" language a limited meaning, "[I]t read[] the phrase to apply — and apparently only to apply — to a federal rule that either 'originated in admiralty' or has 'exclusive application there.'" *Ballard Shipping*, 32 F.3d at 627. Under this restrictive reading, wrongful death and survival statutes would materially prejudice no "characteristic feature" of admiralty because the wrongful death and survival remedies did not originate in or have exclusive application in admiralty. Because applying these state remedies would not conflict with any congressional legislation, *see infra* at typescript 28-32, 32-39, the focus of the inquiry in this case, therefore, is whether the application of state rules of decision will unduly interfere with the uniformity of federal maritime principles.

10. Maritime law is not simply a creature of statute but is more an amalgam of common law and statutory principles. But as we discuss in the next section, the development of the federal law of maritime deaths has become increasingly defined by statute, and the federal statutory schemes have taken a preeminent role in shaping the federal maritime death remedies, including those provided by federal common law. This development, in our view, brings the federal admiralty preemption doctrine more into line with the run-of-the-mill preemption case law, where the focus of the inquiry is in large part on statutory interpretation. *Cf. Ballard Shipping*, 32 F.3d at 630-31 (looking to a recently enacted statute to determine whether a federal common law rule displaced a state statute).

"great and legitimate state concern," a federal court must act with caution before finding displacement of state law).

In light of these general principles, the question in this case — whether state statutory remedies can provide the rule of decision when a recreational boater is killed in territorial waters — largely reduces to an inquiry into whether the different substantive admiralty rules articulated in federal statutes and at common law would be frustrated by the application of state law. *Pope & Talbot, Inc.*, 346 U.S. at 410, 74 S. Ct. at 205 ("[A] state may not deprive a person of any substantial admiralty right as defined in controlling acts of Congress or by interpretative decisions of this Court."); *Wilburn Boat Co.*, 348 U.S. at 332, 75 S. Ct. at 381 (Reed, J., dissenting) ("State power may be exercised where it is complementary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity."); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228, 106 S. Ct. 2485, 2497 (1986) ("[W]here Congress had spoken, or where general federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law.").

But before determining whether the substantive federal policies concerning maritime deaths would be frustrated, it is important to know what policies have, and have not, been articulated. This requires some understanding of the history behind the development of federal remedies for maritime deaths. Although the "tortuous development"[11] of the federal remedies for maritime deaths is familiar to many, and has been amply described elsewhere in the case law,[12] it is essential background, and so we will describe at least the major developments.

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11. *Tallentire*, 477 U.S. at 212, 106 S. Ct. at 2488 ("The tortuous development of the law of wrongful death in the maritime context illustrates the truth of Justice Cardozo's observation that '[death] is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.'") (quoting *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371, 53 S. Ct. 173, 174 (1932)).

12. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-27, 111 S. Ct. 317, 320-23 (1990); *Tallentire*, 477 U.S. at 212-17, 106 S. Ct. at 2488-91.

III. THE RELEVANT FEDERAL LAW

A. *EARLIER BACKGROUND: FROM* THE HARRISBURG *TO* MORAGNE

In 1886, the Supreme Court held in *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, that in the absence of an applicable state or federal statute, the general maritime law did not afford a wrongful death cause of action to the survivors of individuals killed on the high seas, or waters navigable from the sea. The harshness of this rule prompted reaction from district and appeals courts, subsequent Supreme Courts, and Congress. District and appeals courts began to allow recovery for deaths within state territorial waters where the state had an applicable wrongful death statute. *See Tallentire*, 477 U.S. at 212, 106 S. Ct. at 2489.[13] The Supreme Court held in *The Hamilton*, 207 U.S. 398, 28 S. Ct. 133 (1907), that state wrongful death statutes could, in limited circumstances, be applied to fatal accidents occurring on the high seas.[14] Most importantly, Congress, in 1920, enacted (1) the Death on the High Seas Act

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13. *Tallentire* cited, *inter alia*, *City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893) (state wrongful death statute may validly be applied to "maritime affairs within the state limits"), *aff'd in part, rev'd in part on other grounds*, 61 F. 364, 367-68 (2d Cir. 1894) (application of state wrongful death statute to accident in state territorial waters valid "in the absence of any regulation of the subject by [C]ongress") (citing *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1873) and *Sherlock v. Alling*, 93 U.S. (3 Otto) 99 (1876)).

14. Under *The Hamilton*, state wrongful death statutes could apply in admiralty on the high seas where (1) the statutes were *intended* to apply on the high seas, *see Tallentire*, 477 U.S. at 213, 106 S. Ct. at 2489, which was not often the case, *id.* at 213-14, 106 S. Ct. at 2489-90 (quoting *Moragne*, 398 U.S. at 393 n.10, 90 S. Ct. at 1784 n.10); and either (2) "the vessel upon which the wrongful act occurred was constructively part of the territory of the state," or (3) "the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits," *id.* at 214, 106 S. Ct. at 2490 (quoting *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 88 (N.D. Cal. 1954)). As *Tallentire* notes, however, the limitations placed on the operation of state statutes for deaths on the high seas made *The Hamilton* of little practical import in allowing recovery for wrongful death. *Tallentire*, 477 U.S. at 213-14, 106 S. Ct. at 2489-90.

("DOHSA") which provided a federal wrongful death remedy for survivors of all persons, seamen and non-seamen, killed on the high seas, 46 U.S.C.A. §§ 761-768 (1975 & Supp. 1994), and (2) the Jones Act, which gives, among other things, a remedy for the wrongful death of a seaman resulting from a personal injury suffered during the course of the seaman's employment, 46 U.S.C.A. § 688 (1975 & Supp. 1994).

These developments, particularly the enactment of DOHSA and the Jones Act, ensured that a wrongful death remedy would be available for most people killed in maritime accidents. Thus, between 1920 and 1970, deaths on the high seas were remedied by DOHSA, deaths in territorial waters were remedied by state wrongful-death statutes, and deaths of seamen (whether on the high seas or in territorial waters) were remedied by the Jones Act. *The Harrisburg*, however, remained troublesome. Part of the trouble stemmed from the development of different theories of recovery for maritime deaths. Explanation of this difficulty requires reference to the two basic theories on which a seaman can recover for personal injuries.

First, the seaman can claim that the shipowner or some other potentially liable party was negligent; that is the basis for recovery under the Jones Act. Second, the seaman can claim that the vessel was unseaworthy. The doctrine of unseaworthiness basically imposes on a shipowner a nondelegable duty to provide seamen a vessel that is reasonably fit for its purpose;[15] it is a "species of liability without fault." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95, 66 S. Ct. 872, 877 (1946).[16] *The Harrisburg*,

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15. "[I]n the case of non-seamen, the only duty owed by ship-owners is that of exercising due care under the circumstances." 2 BENEDICT ON ADMIRALTY § 81(c), at 7-9 n.18 (7th ed. 1994) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959)).

16. *Sieracki* is better known for its holding that longshore workers were entitled to a warranty of seaworthiness, *id.* at 97, 66 S. Ct. at 878, thus creating "*Sieracki*-seamen." That part of the case was made obsolete by the 1972 amendments to the Longshore and Harbor Workers Compensation Act ("LHWCA"), *see* 33 U.S.C.A. § 905(b) (1986), which precluded longshoremen from taking advantage of the doctrine of unseaworthiness.

however, sharply limited the operation of the doctrine of unseaworthiness when a seaman was killed (as opposed to just being injured) within territorial waters, in the following manner.

Under *The Harrisburg* there was no right to recover for wrongful death under federal maritime law, either on a negligence theory or on an unseaworthiness theory. Although DOHSA allowed recovery based on unseaworthiness for deaths outside the three mile territorial limit, DOHSA did not apply to injuries within territorial waters. This meant that a seaman's survivors could not take advantage of the unseaworthiness doctrine when the seaman was killed in territorial waters unless a state statute allowed recovery based on such a theory. And although some state statutes did, *see The Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503 (1959) (allowing wrongful death action based on the doctrine of unseaworthiness because New Jersey wrongful death statute was construed to allow such a theory), some did not, *see Moragne v. State Marine Lines*, 211 So. 2d 161, 166 (Fla. 1968) (holding that Florida wrongful death statute did not allow recovery for unseaworthiness).

The Harrisburg also created a *complete* bar to recovery for unseaworthiness for "Jones Act seamen" killed in territorial waters when it was combined with *Lindgren v. United States*, 281 U.S. 38, 50 S. Ct. 207 (1930), and *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308 (1964).[17] *Lindgren* and *Gillespie* held that the Jones Act was the exclusive wrongful death remedy for seamen and could not be supplemented by state wrongful death actions.[18] The result was that, since the Jones Act allowed recovery only on the basis of negligence, the doctrine of unseaworthiness

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17. We use the term "Jones Act seamen" in contrast to "Sieracki-seamen," *see supra* n. 16.

18. It is important to note here that both *Lindgren* and *Gillespie* were limited to the preemptive effect of the Jones Act's wrongful death remedy on state wrongful death statutes. They did not challenge the Supreme Court's holding in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944), that an injured Jones Act seaman could invoke the doctrine of unseaworthiness to sue for *injuries*, wherever contracted.

was of no aid to a Jones Act seaman who was killed within territorial waters. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 428-30, 78 S. Ct. 394, 396-97 (1958).

The combination of *The Harrisburg*, *Lindgren*, and *Gillespie* created disarray in the field of remedies for wrongful death of seamen, and led to three "anomalies" or "incongruities" in admiralty law that eventually made the regime intolerable.[19] "First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 26, 111 S. Ct. 317, 322 (1990). Second, survivors of seamen killed outside the three-mile territorial limit could pursue a wrongful death action based on unseaworthiness, while survivors of those killed inside territorial waters could not, unless a state wrongful death statute allowed recovery based on unseaworthiness. *Moragne*, 398 U.S. at 395, 90 S. Ct. at 1785. Third, survivors of a "*Sieracki*-seaman," *see supra* at n.16, could recover for a death within territorial waters under applicable state statutes, while survivors of a Jones Act seaman (a "true" seaman) could not. *Moragne*, 398 U.S. at 395-96, 90 S. Ct. at 1785.

In 1970 the Supreme Court decided that enough was enough, and in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970), the Court overruled *The Harrisburg* and recognized a general maritime wrongful death cause of action under federal common law. *Id.* at 378, 90 S. Ct. at 1776. *Moragne* was, by all accounts, a landmark case. Although its specific holding merely created a general maritime wrongful death remedy based on the doctrine of unseaworthiness, it has since been interpreted as creating a wrongful death remedy based on negligence. *See* GILMORE & BLACK § 6-33, at 368 ("The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness . . . ."); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990).[20]

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19. The "anomalies" were explained in *Moragne*, 398 U.S. 394-96, 90 S. Ct. at 1784-85.

20. The case law, however, does not uniformly hold that the *Moragne* wrongful death remedy applies to claims based on negligence. *See, e.g.*,

Moragne has, of course, been the focus of detailed analysis and description in the case law and commentaries, which we need not repeat here. It is important, however, to point out that, to justify creating the general maritime wrongful death remedy, the Court invoked the need for "uniform vindication of federal policies,"[21] and the "humane and liberal character of proceedings in admiralty."[22]

One aspect of *Moragne* — a jurisprudential one — must however be related in some detail. *Moragne* brought to the fore the importance of federal statutory remedies in determining the appropriate shape of the general maritime law. At the time *Moragne* was decided, DOHSA and the Jones Act both provided wrongful death remedies in admiralty. The existence of these statutory schemes left it unclear whether a court could create a federal common law rule in the area. Although DOHSA and the Jones Act reflected a strong public policy favoring survivors' recovery for wrongful deaths, at the same time they also may have represented a considered legislative judgment that wrongful

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Ford v. Wooten, 681 F.2d 712, 715-16 (11th Cir. 1982) (holding that the *Moragne* remedy applies only to unseaworthiness, not negligence); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979) (en banc) (same, as concerns Jones Act seamen).

21. As Justice Harlan put it:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both of the 1920 Acts [DOHSA and the Jones Act] but also will give effect to the constitutionally based principle that federal law should be a system of law coextensive with, and operating uniformly in, the whole country.

Moragne, 398 U.S. at 401-02, 90 S. Ct. at 1788 (internal quotation marks and citations omitted).

22. *Id.* at 387, 90 S. Ct. at 1780-81 (quoting *The Sea Gull*, 21 Fed. Cas. 909-10 (C.C.D. Md. 1865) (No. 12,578)). The *Moragne* court recognized that the maritime law "included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Id.*

death remedies should go no further than those provided for by statute.

The undertaking in *Moragne*, in large part, was to determine whether the existing statutory remedies were to place a ceiling or a floor on available remedies for wrongful death. After searching the federal legislation and the case law, the *Moragne* court concluded that "Congress [had] given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of [the] petitioner." *Moragne*, 398 U.S. at 393, 90 S. Ct. at 1784. In the absence of such an affirmative indication from Congress, the Court believed it appropriate to recognize a general maritime wrongful death cause of action. As we detail below, this aspect of *Moragne* — the importance of federal statutory schemes in shaping non-statutory remedies — has been particularly far reaching in the Court's wrongful death jurisprudence since *Moragne*.

B. THE POST-MORAGNE CASES: GAUDET, HIGGINBOTHAM, TALLENTIRE, *AND* MILES

Four post-*Moragne* decisions are particularly important to our decision: *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010 (1978); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485 (1986); and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990). These cases have further refined the federal maritime cause of action recognized in *Moragne* and provide some outline of the legal architecture for maritime death claims. But although they adumbrate the domains in which federal statutory, federal common law, and state statutory remedies operate to provide a rule of decision in maritime death cases, a brief survey of these decisions shows that significant areas of uncertainty remain.

1. GAUDET

Gaudet addressed the types of damages available for a longshoreman killed in territorial waters, 414 U.S. at 573, 94 S. Ct. at 806, and concluded that nonpecuniary damages for loss of society were available. *Id.* at 587-88, 94

S. Ct. at 816. Although recognizing that DOHSA did not compensate for nonpecuniary losses, *id.* at 588 n.22, 94 S. Ct. at 816 n.22, the Court studiously ignored the example of DOHSA and followed the "humanitarian policy of the maritime law" that favored recovery for loss of society. *Id.* at 588, 94 S. Ct. at 816. Three aspects of *Gaudet* are worth mentioning. First, the decision recognizes damages for loss of society as being available in a general maritime wrongful death action. *Id.* at 587, 94 S. Ct. at 816. Second, on its face, *Gaudet* appears to approve of the application of state statutes in maritime death cases.[23] *See id.* at 587-88, 94 S. Ct. at 816. Third, and perhaps most important, *Gaudet* (together with its offspring, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S. Ct. 1673 (1980)) represents the first, and last, time that the Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death.[24] *Cf. Gaudet*, 414 U.S. at 601-02, 605, 94 S. Ct. at 823, 825 (Powell, J., dissenting). Indeed, since *Gaudet*, the Court, disapproving of that decision but reluctant to overrule it directly, has narrowed the case to its facts so that the

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23. *Gaudet* also cited approvingly to a decision of this court. *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971), which joined a state survival statute to a general maritime wrongful death cause of action. *Gaudet*, 414 U.S. at 588 n.24, 94 S. Ct. at 817 n.24.

24. In *American Export Lines*, the Supreme Court held that general maritime law allowed the wife of a harbor worker to bring an action for damages for loss of society due to a maritime tort suffered by her husband. Although DOHSA and the Jones Act did not themselves provide such non-pecuniary damages, the Court allowed them, reasoning a la *Gaudet* that DOHSA was the exclusive remedy only for "*fatal* injuries incurred on the "*high* seas." 446 U.S. at 282, 100 S. Ct. at 1678, and that "the Jones Act does not exhaustively or exclusively regulate longshoremen's remedies." *Id.* at 282-83, 100 S. Ct. at 1678.

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317 (1990), allowed a maritime wrongful death action for the death of a Jones Act seaman in territorial waters due to unseaworthiness. Despite the Jones Act's provision of liability only for deaths due to *negligence*, the holding in *Miles* may still be seen as following congressional guidance in that DOHSA allowed recovery for deaths occurring on the high seas due to unseaworthiness, and the Court's holding merely harmonized those two statutes.

decision may be, for all intents and purposes, a dead letter. *See Miller v. American President Lines*, 989 F.2d 1450, 1458 (6th Cir. 1993) ("Although *Gaudet* has never been overruled, its holding has been limited over the years to the point that it is virtually meaningless."), *cert. denied*, 114 S. Ct. 304 (1993).

2. *HIGGINBOTHAM*

In *Higginbotham*, 436 U.S. at 618, 98 S. Ct. at 2010, the Court addressed the question whether survivors of a person killed on the high seas were entitled to recover damages under federal maritime law in addition to the damages available under DOHSA. Of particular interest to the Court was whether the loss of society damages recognized in *Gaudet* were available where the death occurred on the high seas notwithstanding the fact that DOHSA itself did not allow for loss of society damages. The Court's answer was "no." The reasoning of *Higginbotham* was straightforward: Congress had specifically spoken to the issue of damages in DOHSA and provided damages only for pecuniary losses, and it was not open to the Court to authorize supplementary relief that went beyond that authorized by Congress. *Id.* at 626, 98 S. Ct. at 2015. Although not explicit in the decision, *Higginbotham* drew its inspiration directly from the statutory analysis in *Moragne* that we have identified above.[25] The only difference between the analysis in *Moragne* and that in *Higginbotham* is that while *Moragne* saw a gap in the statutory scheme, *Higginbotham* saw none. *See id.* at 625, 98 S. Ct. at 2015.

3. *TALLENTIRE*

Eight years later came *Tallentire*, 477 U.S at 207, 106 S. Ct. at 2485, which involved a claim for damages for a death on the high seas. This time the question was whether remedies available under a state wrongful death action could supplement the remedies available under DOHSA. The Court again said "no," holding that the Louisiana wrongful death statute (which allowed recovery for loss of society) could not apply to a claim governed by DOHSA. *Id.*

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25. *But see id.* at 625, 98 S. Ct. at 2015 (citing *Moragne*'s discussion of congressional intent concerning DOHSA).

at 233, 106 S. Ct. at 2499. Again, the analysis had been foreshadowed by *Moragne* and *Higginbotham*: Congress had spoken directly to the question of damages for deaths on the high seas in DOHSA, and the Court was not free to supplement the statutory scheme (with a state law remedy).

The main battle in *Tallentire*, however, was not over the *applicability* of the *Higginbotham* mode of analysis to a state wrongful death statute;[26] rather, the principal dispute was over the *construction* of Section 7 of DOHSA, which provided in pertinent part that

> [t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

46 U.S.C.A. § 767 (1975). A circuit split existed on the question whether this section preserved the operation of state wrongful death statutes for deaths on the high seas. In a 5-4 decision, the Court held that the clause was nothing more than a jurisdictional savings clause which preserved the rights of state courts to "entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore." *Tallentire*, 477 U.S. at 221, 106 S. Ct. at 2493.

Although the Court justified its result in part by stressing the advantage of having a uniform remedy for deaths on the high seas, *see id.* at 230-31, 106 S. Ct. at 2498-99, the Court's reasoning was ultimately grounded on its interpretation of the legislative history of Section 7 of DOHSA. In surveying the legislative history of DOHSA, the Court stated that Section 7 was included in the act in order to save state remedies within territorial waters. According to the Court, "[t]he reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, so as to 'prevent the Act from abrogating by its own force, the state remedies then

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26. *Tallentire* also discussed the applicability of the remedies afforded under the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331 et. seq. (1986 & Supp. 1994), *id.* at 217, 106 S. Ct. at 2491, but that discussion is not pertinent here.

available in state waters.'" *Id.* at 224, 106 S. Ct. at 2495 (quoting *Higginbotham*, 436 U.S. at 621-22, 98 S. Ct. at 2013) (internal citation omitted). It concluded that

> because DOHSA by its terms extended only to the high seas and therefore was thought not to displace these state remedies on territorial waters, [see *Moragne*], § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court.

Id. at 224-25, 106 S. Ct. at 2495. According to one commentator, the implication of the Court's decision in *Tallentire* is that although survivors of a person killed on the high seas may seek only the limited recovery provided by DOHSA, "[i]f the same accident occurs within a marine league from shore, where [DOHSA] has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses." 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3672, at 295 (Supp. 1994).

4. *MILES*

The latest case in the Court's wrongful death jurisprudence is *Miles*, 498 S. Ct. at 19, 111 S. Ct. at 317. In *Miles*, the mother of a Jones Act seaman killed in territorial waters pressed a *Moragne* cause of action based on the doctrine of unseaworthiness. The Court considered two issues: first, whether the Jones Act provided the exclusive measure of remedies for the death of a Jones Act seaman where recovery was premised on the *Moragne* cause of action, and second, whether a general maritime survival action recognized loss of future earnings for a Jones Act seaman. The Court held that the Jones Act damages were the exclusive measure of damages allowed to a Jones Act seaman, regardless of whether the claim was based on *Moragne*; it then held that the Jones Act damages controlled any recovery based on a general maritime survival action for the death of a Jones Act seaman, and that since the Jones Act did not allow recovery for future earnings, they were not recoverable under *Moragne*. *Id.* at 32-33, 36, 111 S. Ct. at 326, 328.

Miles reflects the preeminence that the *Moragne* statutory analysis has achieved in shaping wrongful death remedies. By the time of *Miles*, the entire inquiry into remedies for deaths has been reoriented into an inquiry into what the relevant statutes had stated.

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.

Id. at 27, 111 S. Ct. at 323. But importantly for this appeal, *Miles* showed no great hostility to the operation of state statutes in providing rules of decision in admiralty cases.

The passage quoted above hints that state statutory schemes have a role to play in admiralty cases. Such a role received fuller articulation later in the *Miles* opinion, where the Court discussed the question whether a general maritime survival action existed. Although it ultimately declined to address the issue, the Court's discussion seemed to sanction some lower courts' practice of applying state survival statutes to deaths at sea. *Id.* at 326 ("Most States have survival statutes applicable to tort actions generally, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. . . . Where these state statutes do not apply, however, or where there is no state survival statute, there is no survival of unseaworthiness claims absent a change in the traditional maritime rule.") (internal citations and footnote omitted).

5. *EMERGING TRENDS*

Although the trend in the post-*Moragne* case law can be explained by reference to the rise in the importance of federal statutory schemes in shaping maritime remedies, it would be myopic not to recognize the other forces at work. One trend that cannot be ignored is that the Court seems to be cutting back on plaintiffs' rights in maritime actions.

Throughout the 1950s and 1960s, the Supreme Court expanded the rights of plaintiffs by generally allowing plaintiffs the benefit of whichever rule, state or federal, was more favorable to recovery. *See* GILMORE & BLACK § 6-61, at 463-68. *Moragne* — or perhaps *Gaudet* — represented the apex of the Court's policy of expanding plaintiffs' rights in admiralty actions. *Higginbotham*, *Tallentire*, and *Miles*, in contrast, show a tendency on the part of the Court during the last two decades to reverse its policy of favoring seamen plaintiffs.

A second trend is the weakness with which the principle of uniformity, i.e., the notion that *Moragne* initiated a trend in the case law to make recovery for maritime deaths more uniform — which permeates the rhetoric of the case law — has been actually applied in these cases. For, although the cases often mention uniformity as a guiding principle, the Court's actions belie its importance. *Higginbotham*, for example, quite consciously created an anomaly (the unavailability of non-pecuniary damages for wrongful death at high sea where such damages were available to longshoremen killed in territorial waters), stating that "a desire for uniformity cannot override the statute [DOHSA]." 436 U.S. at 624, 98 S. Ct. at 2014. Similarly, *Tallentire* rejected a rule that would make DOHSA recoveries consistent with those available under *Moragne* for deaths on territorial waters. *See Tallentire*, 477 U.S. at 233, 106 S. Ct. at 2499-500. And *Miles* viewed the variety of survival actions under state law without alarm, declining to fashion a uniform federal rule on the matter that would cover all plaintiffs. *See* 498 U.S. at 34, 111 S. Ct. at 326-27.[27] We

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27. *See also American Dredging*, 114 S. Ct. at 987:

> "It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[.] [b]ut this limitation still leaves the states a wide scope. State created liens are enforceable in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of

believe that the thrust of these cases suggests that the concept of uniformity has a good deal less weight than has been thought, *see also Sutton v. Earles*, 26 F.3d 903, 917 (9th Cir. 1994) (invoking *Gaudet* and *Higginbotham* to reject uniformity argument untethered to statute), and that it has significance to the extent that it aids in the "vindication of federal policies," *Moragne*, 398 U.S. at 401, 90 S. Ct. at 1788.

C. WRONGFUL DEATH VS. SURVIVAL ACTIONS IN THE SCHEMA

We have discussed this case law at such length because a thorough understanding of it is critical to our analysis of the issue presented here. Before we turn to that analysis, however, we must identify another aspect of the legal background that often appears to be glossed over in the case law of maritime deaths. Throughout the previous discussion of the case law, reference has been made to wrongful death actions and to survival actions. Although they are often lumped together without any distinction, *see Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1093 (2d Cir. 1993) (where plaintiffs treated as a single action a claim for "wrongful death and survivorship benefits"), they are, in fact, quite distinct. *See, e.g., Gaudet*, 414 U.S. at 575 n.2, 94 S. Ct. at 810 n.2 (distinguishing wrongful death statutes from survival statutes).

A wrongful death cause of action belongs to the decedent's dependents (or closest kin in the case of the death of a minor). It allows the beneficiaries to recover for the harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what the beneficiaries

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> maritime insurance — all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity."

(quoting *Romero*, 358 U.S. at 373-74, 79 S. Ct. at 480-81) (alterations and omissions in *American Dredging*).

would have "received" from the decedent and can include recovery for pecuniary losses like lost monetary support, and for non-pecuniary losses like loss of society. 2 BENEDICT ON ADMIRALTY § 81(a), at 7-2. A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the *deceased* by the action causing death. Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings (both past and future), and funeral expenses. *Id.*

The Jones Act (by incorporating the FELA) contains both a wrongful death provision and a survival provision. *Moragne*, 414 U.S. at 575 n.2, 576, 94 S. Ct. at 810 & n.2. DOHSA contains a wrongful death provision, but does not contain a survival provision. *Id.* General maritime law contains a wrongful death action by way of *Moragne*, but the Supreme Court has not recognized a survival action. As was mentioned above, both *Tallentire* and *Miles* have stressed that there is as yet no clear federal rule on the extent to which state survival remedies are available under DOHSA or *Moragne*. *See Miles*, 498 U.S. at 33-34 & n.2, 111 S. Ct. at 326-27 & n.2; *Tallentire*, 477 U.S. at 215 n.1, 106 S. Ct. at 2490 n.1 (declining to approve or disapprove of the application of state survival statutes to cases involving deaths on the high seas).

With this distinction in mind, we now turn to the question whether state wrongful death and survival statutes conflict with the principles articulated in the post-*Moragne* line of cases.

IV. CHOICE OF LAW ANALYSIS

As our previous analysis has shown, there is no federal rule, either statutory or at common law, that explicitly precludes the operation of state wrongful death or survival statutes in cases involving recreational boaters killed in territorial waters. DOHSA applies only to deaths on the high seas. The Jones Act applies only to seamen. And no Supreme Court case has explicitly held that *Moragne* displaces state wrongful death or survival remedies for non-

seamen killed in territorial waters. Of course, federal law still should displace the state wrongful death and survival statutes if such statutes stand as obstacles to the accomplishment and execution of the clearly expressed policies of federal maritime law. It appears, however, that neither state survival statutes nor wrongful death statutes stand as such obstacles.

A. SURVIVAL STATUTES

The question whether federal maritime law displaces state survival statutes in the context of recreational boaters killed in territorial waters need not detain us long. As we have explained above, there does not appear to be any substantive federal policy addressing survival actions for non-seamen. Although DOHSA does not contain a survival provision, its absence does not show that Congress expressed an "affirmative indication of an intent to preclude," *see Moragne*, 398 U.S. at 393, 90 S. Ct. at 1784, state survival statutes from operating in territorial waters for, as *Tallentire* tells us, Congress specifically limited the reach of DOHSA " 'so as to prevent the Act from abrogating by its own force the state remedies then available in state waters.' " *Tallentire*, 477 U.S. at 224, 106 S. Ct. at 2495 (quoting *Higginbotham*, 436 U.S. at 621-22, 98 S. Ct. at 2013).[28]

Moreover, although *Moragne* does not recognize a survival action, we do not believe that the Court's post-*Moragne* case law reflects any intent to preclude survival actions based on state law. Quite the contrary, in its discussion of

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28. Indeed, as we have mentioned, *Tallentire* left open the question whether state survival statutes could provide a rule of decision even for death on the high seas. *See also Miles*, 498 U.S. at 34 n.2, 111 S. Ct. at 326-27 n.2; *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) (holding that in lawsuit premised on DOHSA, Pennsylvania survival statute could be applied concurrently). And the Fifth Circuit has held, in the wake of the *Gaudet*, *Higginbotham*, *Tallentire*, and *Miles* quartet, that DOHSA does not preempt a general maritime survival action. *Barris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543 n.2 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 430 (1991); *Graham v. Milky Way Barge*, 824 F.2d 376, 386-87 (5th Cir. 1987).

the possible existence of a general maritime survival remedy in *Miles*, the Court seemed to endorse (or at least not preclude) the practice of applying state survival statutes for deaths occurring within territorial waters. *See* 498 U.S. at 33-34, 111 S. Ct. at 326.

In light of this case law, we hold that federal admiralty law, as articulated both by statute and by the federal common law, does not preempt the application of state survival statutes for deaths of recreational boaters (non-seamen) within territorial waters.[29] Such a holding, we believe, is the one most consistent with federal/state conflict of law principles, particularly the presumption against preemption. *See supra* at typescript 13-14. In our view, a holding contrary to the one we reach would require the conclusion that federal admiralty law conflicts with state law in an area where *neither* Congress *nor* admiralty law has provided any rule of decision. Such a holding would ignore traditional conflicts principles.

We also believe that our result is not inconsistent with the holding in *Miles* that future earnings, one of the major components of survival damages, are not available to a Jones Act seaman. Unlike DOHSA, the Jones Act does provide for a survival action, and under the Jones Act, recovery on a survival action is limited to losses suffered during the decedent's lifetime. See 45 U.S.C.A. § 59 (1986); *Miles*, 498 U.S. at 35, 111 S. Ct. at 327. As *Miles* recognized, *Congress* made the decision in the Jones Act to place a limit on a seaman's recovery, and hence the Supreme Court should not disregard "Congress' ordered system of recovery," *id.* at 36, 111 S. Ct. at 328, by supplementing recovery, even if forceful policy arguments favored recovery of future earnings, *id.* at 35-36, 111 S. Ct. at 327 ("There are indeed strong policy arguments for allowing [recovery of future earnings].").

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29. We have alternated in our discussion between the terms "recreational boaters" and non-seaman, and we mean to use the terms interchangeably. We do not mean to intimate that crew members of a racing yacht or some other non-recreational vessel should be treated differently than someone in Natalie Calhoun's position. The applicable remedy depends on whether such crew members fall within the Jones Act as seamen.

But the Jones Act applies only to seamen. And Yamaha has not demonstrated that Congress intended the limitation on damages in the Jones Act to extend beyond seamen. By its terms, the act is strictly limited to a certain class of plaintiffs. We believe that a state statute allowing recovery of future earnings would not be plainly inconsistent with the federal law, nor would it frustrate Congress' scheme of compensation for seamen, when it is applied to people who fall outside the scope of the congressionally mandated recovery scheme for maritime injuries and death.[30] *See also Garner v. Dravo Basic Materials Co.*, 768 F. Supp. 192, 195 (S.D. W. Va. 1991) (holding that *Miles* does not preclude loss of future earnings in death of a non-seaman because Jones Act does not extend to non-seamen).[31] In sum, we

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30. The Second Circuit has stated that the Court's language in *Miles* did not limit its holding to Jones Act seamen. *See Wahlstrom v. Kawasaki Heavy Indus. Inc.*, 4 F.3d 1084, 1093 (2d Cir. 1993). The Second Circuit reached this conclusion by stating:

> The Court's analysis relied heavily upon the decedent's status as a seaman and the resultant applicability of the Jones Act, but the announced conclusion of its opinion (unlike the companion ruling as to loss of society) was not confined to seamen.

Id. (internal citation omitted). However, the language from the conclusion in *Miles* — "We . . . hold that a general maritime survival action cannot include recovery for decedent's lost future earnings," 498 U.S. at 37, 111 S. Ct. at 328 — clearly referenced the particular decedent involved in that case. The language did not say "a decedent" or "any decedent." It simply said "decedent." We believe that the Second Circuit's reading of the conclusion is not compelled by the language, and given that such a reading ignores the Court's rationale for denying future earnings, we decline to follow it. *See also Sutton v. Earles*, 26 F.3d 903, 916-17 (9th Cir. 1994) (criticizing *Wahlstrom* and declining to follow its denial of loss-of-society damages to non-dependent parents).

31. Even assuming that the *Miles* holding extends beyond seamen, we are not sure that its rule against future earnings would extend to deny recovery of such earnings in the case at bar. The rule denying lost future earnings, implied from the exclusivity of the Jones Act, presupposes that the decedent had a livelihood and that his dependents would be entitled to damages for loss of support under the wrongful death provision. Apparently, the Jones Act denies recovery of lost future earnings only because, as *Miles* explained:

hold that general maritime law does not preempt state law survival statutes in survival actions based on the death of a nonseaman in territorial waters, and that such statutes consequently govern the instant case. We turn therefore to the question whether the federal maritime law displaces state wrongful death remedies.

B. WRONGFUL DEATH STATUTES

Whether federal admiralty law preempts state wrongful death statutes from applying to accidents to non-seamen in territorial waters presents a more difficult inquiry. *Moragne* apparently creates a federal wrongful death remedy that applies to non-seamen in territorial waters.[32] Yamaha

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Recovery of lost future earnings in a survival suit will, in many instances, be duplicative of recovery by dependents for loss of support in a wrongful death action; the support dependents lose as a result of the seaman's death would have come from the seaman's future earnings.

Miles, 498 U.S. at 35, 111 S. Ct. at 327. This rationale appears to be quite suspect when the decedent is someone who is not employed, especially a child. A child does not typically support her parents and so loss of support damages will be negligible. A child's expected future earnings, however, may be considerable. Allowing for lost future earnings under such circumstances raises minimal risk of duplicative recovery. In our view, to deny loss of future earnings under such circumstances gives a windfall to potential defendants. Thus, even if there is a federal rule which extends beyond seamen to conflict with a state survival statute allowing recovery of lost future earnings, we doubt that the federal rule would extend to deny lost future earnings when the decedent was a child and loss of support damages would be negligible. We also doubt its applicability to cases where the decedent was an adult who, unlike a Jones Act seaman, was unemployed. This analysis, we add, is not intended to suggest case-by-case preemption analysis, but rather to demonstrate why, in policy terms, the construction advanced by Yamaha is flawed and hence unlikely to have animated the Supreme Court. *See Garner*, 768 F. Supp. at 195.

32. The *Moragne* remedy might apply only to Jones Act seamen and to those others, including longshoremen, to whom a *federal* duty of seaworthiness or due care is owed. *Moragne* explicitly grounded its holding in the propriety of extending a federal remedy to correspond to the "federally imposed duties of maritime law," filling a gap left by some state statutes. *See Moragne*, 398 U.S. at 401 & n.15, 90 S. Ct. at 1788.

argues that *Moragne* therefore displaces state wrongful death statutes. But although we know that *Moragne* provides a wrongful death remedy, the precise contours of that remedy are not yet fully defined.[33] Unless applying

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33. Even if *Moragne* did provide a clear rule of decision in this area, however, the mere existence of a federal wrongful death cause of action does not necessarily require displacement. *Cf. California v. ARC America Corp.*, 490 U.S. 93, 101-02, 109 S. Ct. 1661, 1665 (1989) (concurrent application of federal and state rules of decision are allowed); *Tallentire*, 477 U.S. at 224, 106 S. Ct. at 2495 ("States could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters.") (citing *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89 (1921), and *Steamboat Co. v. Chase*, 16 Wall. 522, 21 L. Ed. 369 (1873)); GILMORE & BLACK § 1-17, at 49-50 ("All that can be said in general is that the states may not flatly contradict established maritime law, but may 'supplement' it, to the extent of allowing maritime recoveries in some cases where the maritime law denies them . . . ."). Concurrent application of state and federal law is commonplace, particularly in areas governed by federal common law. *See, e.g., ARC America*, 490 U.S. at 101-02, 109 S. Ct. at 1665 (antitrust); *Madruga v. Superior Court of California*, 346 U.S. 556, 561, 74 S. Ct. 298, 301 (1954) ("Aside from its inability to provide a remedy *in rem* for a maritime cause of action, . . . a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.'") (quoting *Red Cross Line*, 264 U.S. at 124, 44 S. Ct. at 277).

Indeed even where the states may impose liability beyond that imposed under federal law, there is not necessarily a conflict, particularly in the absence of a statement from Congress to the contrary. *See ARC America*, 490 U.S. at 105, 109 S. Ct. at 1667 ("Ordinarily, state law causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, . . . and no clear purpose of Congress indicates that we should decide otherwise in this case.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257-58, 104 S. Ct. 615, 626-27 (1989), and *California v. Zook*, 336 U.S 725, 736, 69 S. Ct. 841, 847 (1949)). In the traditional concurrent application of state law context, in which there is a clear federal rule, a legitimate state law may still apply if it does not impose too great a burden on the uniform vindication of the federal policy. *See, e.g., Ballard Shipping*, 32 F.3d at 630 (describing the interest-balancing approach and suggesting that the inquiry reduces to the "familiar one of burden"). Here, by contrast, there is no specific federal rule on point, and we thus need not analyze the question under the rubric of "incorporation." State law, subject to

state law would be inconsistent with, or would frustrate the operation of, a particular federal maritime rule of decision in this area, *Moragne* should not displace state law rules of decision for deaths of non-seamen in territorial waters.[34]

Yamaha's argument that *Moragne* displaces all state wrongful death statutes as rules of decision is fairly straightforward: both DOHSA and the Jones Act preempt state wrongful death statutes, so why shouldn't *Moragne*?[35] This argument, at least on its face, is seductive. *Tallentire*, *Higginbotham*, and *Miles* are to at least a certain extent the lineal descendants of *Jensen*, which introduced the

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possible preemption on grounds we have enumerated, applies of its own force. *See, e.g., Wilburn Boat Co.*, 348 U.S. at 316, 75 S. Ct. at 371 ("[The 'literal performance' rule of insurance contracts law] has not been judicially established as part of the body of federal admiralty law in this country. Therefore, the scope and validity of the [maritime insurance] policy provisions here involved and the consequences of breaching them can only be determined by state law unless we are now prepared to fashion controlling federal rules.").

34. And were *Moragne* to extend to persons in Natalie Calhoun's circumstances, we might hold that its wrongful death remedy either does not displace or actually incorporates state (and territorial) law; "the demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests." *Wilburn Boat Co.*, 348 U.S. at 323-24, 75 S. Ct. at 376 (Frankfurter, J., concurring in the result). As our analysis below indicates, Congress has expressed an affirmative intent, as far as civilians are concerned, to preserve state law remedies in territorial waters. *See infra* at typescript 37-38.

35. The rule that the Jones Act preempts state remedies stems from *Lindgren* and *Gillespie* (which held that the Jones Act was the exclusive remedy for survivors of seamen killed in territorial waters). These cases may not have survived *Moragne*, *see* GILMORE & BLACK § 6-32, at 368 (saying that *Moragne* effectively overruled *Lindgren* and *Gillespie*), although in *Miles* the Court suggested that at least with respect to the issue of the preemption of state remedies, *Lindgren* and *Gillespie* are still good law. *See Miles*, 498 U.S. at 29, 111 S. Ct. at 324 ("[T]he preclusive effect of the Jones Act established in *Lindgren* and *Gillespie* extends only to state remedies . . . ." (citing *Moragne*, 398 U.S. at 396, n.12, 90 S. Ct. at 1785 n.12). At all events, the premise of Yamaha's argument that the federal statutes displace all state remedies is not free from doubt, even where the federal statutes apply.

importance of "uniformity" in admiralty law and stressed the preeminence of federal maritime law over state law rules of decision. *See Jensen*, 244 U.S. at 216, 37 S. Ct. at 529.[36]

But unlike the situations in *Tallentire*, *Higginbotham*, and *Miles*, each of which implicated clearly articulated federal statutory schemes, the *Moragne* cause of action in this context reflects anything but a clearly articulated scheme. Not only has Congress said nothing about the applicability of particular remedies, but the Court's common law has not either. And since *Moragne* explicitly left open a number of questions about remedies, application of state remedies remains permissible to the extent they do not conflict with whatever settled principles exist.[37] This proposition is true

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36. Of course Justice Holmes dissented in *Jensen*, uttering what is perhaps his best known statement: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified." 244 U.S. at 222, 37 S. Ct. at 531 (Holmes, J. dissenting). And *Jensen* has since been called the *Lochner* of the federal maritime law. *See American Dredging*, 114 S. Ct. at 991 (Stevens, J. concurring) ("*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905), would be in a case under the Due Process Clause.") (parallel citation omitted).

37. Although Yamaha has been able to muster considerable support in the case law for its position that *Moragne* displaces all state wrongful death statutes, the case law appears to be split on this issue. *Compare Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1089 (2d Cir. 1993) (citing cases); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Choat v. Kawasaki Motors Corp.*, 1994 A.M.C. 2626 (Ala. 1994); *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex. 1991) (holding that *Moragne* displaces state wrongful death and survival statutes), *cert. denied*, 112 S. Ct. 301 (1991), *with Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1280 n.12 (1st Cir. 1993) ("Even today, plaintiffs may invoke state wrongful death statutes under the saving clause insofar as they involve accidents in territorial waters and do not conflict with the substantive principles developed under the maritime wrongful death doctrine."), *cert. denied*, 113 S. Ct. 2967 (1993); *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (Breyer, J.) (applying Massachusetts state law as its rule of decision in wrongful death action brought by survivor of person killed in a scuba accident within Massachusetts territorial waters). *Cf. Favorito v. Pannell*, 27 F.3d 716

whether state laws operate to plaintiffs' or defendants' benefit. *See, e.g., Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1528-33 (11th Cir. 1990) (per curiam) (applying exclusivity provisions of Georgia Worker's Compensation Act to *exclude* additional recovery under general federal maritime law to nonmaritime worker injured within territorial waters), *cert. denied*, 498 U.S. 1026, 111 S. Ct. 676 (1991).

Prior to *Moragne*, it was well established that state wrongful death statutes could apply to maritime deaths occurring in territorial waters. *Lindgren*, 281 U.S. at 43-44, 50 S. Ct. at 210 ("[Before the Jones Act], in the absence of any legislation by Congress, . . . where a seaman's death resulted from a maritime tort on navigable waters within a State whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel in personam for the damages sustained by those to whom such right was given.");[38] *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 245, 63 S. Ct. 246, 251 (1942) ("[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State."); *The Tungus*, 358 U.S. at 590-91, 79 S. Ct. at 505-06 (pre-*Moragne* rights of non-seaman killed in state territorial waters depend on state wrongful death statute).[39]

(1st Cir. 1994) (applying Rhode Island law to claims arising from allision of small boat with anchored vessel within Rhode Island's territorial waters and citing *Lyon*); *Marine Transp. Serv. v. Python High Performance*, 16 F.3d 1133 (11th Cir. 1994) (although recognizing that general maritime law was applicable to the claim under admiralty jurisdiction, nevertheless applying principles of Florida equitable estoppel law in commercial dispute).

38. *See also id.* at 44, 50 S. Ct. at 210 ("[S]such statutes 'were not a part of the general maritime law' and were recognized only because Congress had not legislated on the subject.").

39. This aspect of the holding of *The Tungus* retains vitality post-*Moragne*, for the *Moragne* Court "concluded that the primary source of the confusion [in the law of maritime wrongful deaths] is not to be found in *The Tungus*, but in *The Harrisburg*." *Moragne*, 398 U.S. at 378, 90 S. Ct. at 1776, only the latter of which *Moragne* accordingly overruled. *Id.* at 409, 90 S. Ct. at 1792.

Furthermore, *Moragne* itself showed no hostility to concurrent application of state wrongful death statutes. Indeed, to read into *Moragne* the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The *Moragne* cause of action was in many respects a gap filling measure to ensure that seamen (and their survivors) would all be treated alike. *Gaudet*, 414 U.S. at 596, 608 n.19, 94 S. Ct. at 820, 826 n.19 (Powell, J., dissenting). The "humane and liberal" purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seaman died did not incorporate special maritime doctrines. It is difficult to see how this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy.

Of course, as we have mentioned above, *Moragne* also recognized the importance of federal statutory commands in shaping the general maritime wrongful death remedy — both in the way in which it created a general maritime wrongful death remedy, and in its suggestion that courts should look to statutes for guidance in developing the contours of that remedy. And post-*Moragne* jurisprudence has given that principle preeminence. But a proper application of this principle, in our view, shows that state wrongful death statutes should not be displaced in this context. Our principal guidance on this issue comes from *Tallentire* and its interpretation of DOHSA, the one federal statute applicable to non-seamen.

Although *Tallentire* held that DOHSA displaced state wrongful death statutes for deaths on the high seas, its analysis of Section 7 of DOHSA is of considerable importance in understanding the extent to which the DOHSA remedies should not be treated as the exclusive types of remedies in a *Moragne* cause of action. Of decisional importance in *Tallentire* was the notion that by enacting Section 7 of DOHSA, Congress intended to preserve concurrent state jurisdiction for maritime deaths within state territorial waters. As we have discussed in the previous section, the Court stressed that the animating

purpose of Section 7 was to preserve to the states "jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters," and that "[b]ecause DOHSA by its terms extended only to the high seas and therefore was thought not to displace [state wrongful death remedies] on territorial waters, § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court."[40] *Tallentire*, 477 U.S. at 225, 106 S. Ct. at 2495 (internal citation omitted). *Tallentire* thus tells us that DOHSA was affirmatively intended to preserve state wrongful death remedies for survivors of people killed in territorial waters. This intent to preserve state wrongful death remedies in state territorial waters should not be lightly disregarded, particularly since *Moragne* and its progeny say nothing explicit about abrogating state remedies.

Tallentire's interpretation of DOHSA is also important for another reason. It suggests that there is a more fundamental flaw in Yamaha's argument that the incorporation of DOHSA's provisions into a *Moragne* cause of action should be treated as displacing all state wrongful death remedies. If Yamaha is right, it means that *Moragne* gives DOHSA preclusive effect in an area (maritime deaths in state territorial waters) in which Congress explicitly intended DOHSA to have no such effect. *See The Tungus*, 358 U.S. at 608, 79 S. Ct. at 514 ("It is odd to draw restrictive inferences from a statute whose purpose was to extend recovery for wrongful death."). So interpreted, *Moragne* would thus transform a statute explicitly designed to preserve state remedies into one that would displace them. In our view, such a result would cut *Moragne* loose from its conceptual moorings and disregard Supreme Court teachings since *Moragne* that we must look to congressional

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40. *See also id.* ("The felt necessity for a DOHSA saving clause, then, may be traced to the fact that [state] wrongful death statutes like workmen's compensation schemes were not common law remedies, and thus may not have been deemed saved to suitors under the Judiciary Act of 1789, as construed in *Jensen*.") (internal quotation marks and citations omitted).

statutory commands to determine what remedies are available for maritime deaths.

But even if DOHSA is not treated as *explicitly* allowing state law to operate in this area, at the very least the legislative history of DOHSA shows no hostility toward the application of state wrongful death statutes in territorial waters. *See Gaudet*, 414 U.S. at 588 n.22, 94 S. Ct. at 816 n.22. And since a "clear conflict" must exist before state law is displaced by federal admiralty law, *see Askew*, 411 U.S. at 325, 93 S. Ct. at 1600, we cannot find that *Moragne* displaces state wrongful death remedies for deaths of non-seamen in territorial waters. Because we see no congressional intent to preclude the operation of state wrongful death statutes, and, indeed, believe that DOHSA arguably preserves state wrongful death remedies in territorial waters, we hold that state wrongful death statutes provide the rule of decision when a recreational boater is killed in territorial waters.

We find support for this result in Judge Breyer's opinion in *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (applying Massachusetts state law as its rule of decision in wrongful death action brought by survivor of person killed in scuba accident within Massachusetts territorial waters), and the views of a leading commentator, 14 Charles A. Wright et al., *Federal Practice and Procedure* § 3672 at 295 (2d ed. Supp. 1994) ("If the same accident [one falling within the provisions of DOHSA] occurs within a marine league from shore, where [DOHSA] has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses."). *Cf. Ballard Shipping*, 32 F.3d at 631 (holding that the federal maritime economic loss rule of *Robbins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), which denies recovery for purely economic losses, did not displace a Rhode Island statute that allowed damages for some economic losses).

We also believe our holding to be in full accord with the principle of uniform vindication of federal maritime policies that, however attenuated, *see supra* at typescript 25-27, has generally been considered the hallmark of conflicts jurisprudence in admiralty law. In terms of the notion of

uniformity, Yamaha's claim basically boils down to the following proposition: state wrongful death statutes cannot apply to deaths to recreational boaters in territorial waters because it would raise the possibility of different remedies depending on the location of the accident and the citizenship of the parties.[41] But Yamaha "heralds the need for uniformity without an appreciation for the boundaries of its relevance." *Ellerwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1279 (1st Cir. 1993). The argument simply proves too much. "All state laws, if given effect in admiralty cases, interfere to a degree with the uniformity of admiralty law." 1 BENEDICT ON ADMIRALTY § 112, at 7-36.

Perhaps recognizing that its uniformity argument proves too much, Yamaha advanced a variant of it at oral argument, suggesting that accepting the Calhouns' position on available damages would lead to the following allegedly untenable result: in an accident on a ship in which a non-seaman and a seaman were each killed, the non-seaman's survivors would potentially be entitled (depending on the state statute) to higher damages than those available to the survivors of the seaman. This result, however, is untenable only if we assume that a person's statutory status should be irrelevant for purposes of determining recovery for maritime deaths. But *Miles*, by denying loss of society damages to the survivor of a seaman because the seaman was covered by the Jones Act, has told us that such status does make a difference. 498 U.S. at 32-33, 111 S.Ct. at 325-26.[42]

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41. Yamaha states, in terrorem:

> The Calhouns argue against the weight of authority and against the concept of uniformity; instead they espouse a different remedy for civilians injured in territorial waters than that afforded seamen and maritime workers by Congress and the Supreme Court. If accepted, their argument would result in at least 50 different possible measures of damages for the same cause of action, depending solely on the citizenship of the decedent and/or the place of the accident.

Reply/Answering Brief of Appellants/Cross-Appellees at 1-2.

42. The case law is replete with statements that non-seamen should not be entitled to damages in greater amounts than seaman because allowing recovery would not foster admiralty's aim of providing special solicitude to seamen. *See, e.g., Wahlstrom*, 4 F.3d at 1092. But this argument seems to us to be a non sequitur, for it is difficult to see how denying recovery to non-seamen's survivors shows any special solicitude to seamen or their survivors.

More fundamentally, however, it is fairly common for tort systems to allow different recoveries based on the injured party's status. The problem Yamaha poses arises all of the time, whenever two parties are injured in the same event but one is covered by worker's compensation and the other is not. Even within maritime law, differing recoveries based on status occur all of the time. Longshoremen and seamen can often be injured in the same event, but a longshoreman covered by LHWCA, 33 U.S.C.A. §§ 901 *et seq.* (1986), cannot sue under the doctrine of unseaworthiness, while a seaman can.

A similar asymmetry exists between non-seamen and seamen where non-seamen cannot take advantage of the doctrine of unseaworthiness. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629, 79 S. Ct. 406, 409 (1959); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 294 n.11 (5th Cir. 1990). For instance, should a non-seaman and a seaman be injured due to a non-negligent but unseaworthy condition of the vessel, the seaman would recover and the non-seaman would not. This analogy has especial importance because in *Moragne* itself a negligence theory was at all times still available to the plaintiff.[43]

Indeed, this case is, in many respects, the mirror image of *Moragne*. *Moragne* was driven by the realization that the state wrongful death tort system simply could not be grafted wholesale onto the regime governing torts affecting seamen. 398 U.S. at 401, 90 S. Ct. at 1788 (stating that its holding would remove the "tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts"). To accept Yamaha's position in this case would create the opposite of the problem faced in *Moragne*, for we

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43. It is often a quite reasonable choice for a group of potential plaintiffs to give up the prospect of huge damages in return for easier theories of recovery, and vice versa. The trade-off that the longshoreman received in exchange for losing the right to sue on an unseaworthiness theory was an increase in the compensation benefits under the LHWCA and expanded coverage. *See* Gilmore & Black § 6-53, at 437 & n.339. More specifically, a trade-off similar to the one made in the context of longshore workers' injuries seems quite reasonable in the context of this case.

would be grafting a compensation scheme designed principally for seamen onto cases that fit easily within the tort systems developed by the states. This case is, at base, no different than a cause of action arising out of the average motor vehicle accident.

Finally, we note that states have substantial interests in policing their territorial waterways and protecting their citizens through their tort systems. In light of such interests, we should be loath to displace their statutes under our federal common law power absent a clear federal rule. *See American Dredging*, 114 S. Ct. at 992 (Stevens, J. concurring) (citing *Cippolone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992)). Although we recognize that the rule barring state claims if they conflict with basic maritime principles often requires a delicate accommodation of federal and state interests, here, in the absence of a clear federal interest, we think that the balance tips in favor of allowing state law to apply. In sum, we hold that general maritime law does not preempt state law wrongful death acts in actions based on the death of a nonseaman in territorial waters, and that such acts therefore govern this case.

V. CONCLUSION

For reasons we have explained above, before reaching the question certified by the district court it is necessary to determine what law governs this dispute, and the bulk of our opinion has been devoted to resolving that difficult question. We have concluded that whether loss of society, loss of support and services, future earnings, or punitive damages are available for the death of a non-seaman in territorial waters is a question to be decided in accordance with state law. We do not, however, reach the question of which state's law — Pennsylvania's or Puerto Rico's — applies. The district court did not consider that issue, and we decline to do so, preferring to have the district court address it in the first instance. Accordingly, we do not answer the certified question in terms. (As explained earlier, *see supra* at typescript 6-7, under Section 1292(b) we need not reach the certified question, but only decide the appeal from the challenged order.) We have, however,

given the district court sufficient guidance so that it may now do so with facility. Since the question of which state's law applies is plainly open, we will affirm the district court's order denying defendant's motion for summary judgment on loss of society and loss of support damages, but we will reverse the order granting defendant's motion for summary judgment on lost future earnings and punitive damages.

The parties shall bear their own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.;
YAMAHA MOTOR CO., LTD.;
PALMAS DEL MAR COMPANY;
PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.;
MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM
PROPERTIES, INC.; ABC CORPORATION; XYZ
PARTNERSHIP(S); CANDELERO
HOTEL CORPORATION;
MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and
Yamaha Motor Company, Ltd.,
Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
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Appellants in No. 93-1737

v.

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PROPERTIES, INC.; ABC CORPORATION;
XYZ PARTNERSHIP(S);
CANDELERO HOTEL CORPORATION;
MARINA DE PALMAS SHIPYARD, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04295)

Present: Becker, Mansmann and Scirica, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 13, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered December 29, 1992, which was certified for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b) by order entered June 3, 1993, which, in turn, was amended by order entered June 21, 1993, be and the same is hereby affirmed with respect to the denial of defendant's motion for summary judgment on loss of society and loss of support damages, but reversed with respect to the grant of defendant's motion for summary judgment on lost future earnings and punitive damages. The parties shall bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk

Clerk

Dated: November 2, 1994
Certified as a true copy and issued in lieu of a formal mandate on December 15, 1994

P. Douglas Sisk

Teste:
Clerk, United States Court of Appeals for the Third Circuit

Filed November 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

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YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04295)

Argued: April 13, 1994

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges.

(Opinion Filed November 2, 1994)

ORDER AMENDING OPINION

BECKER, *Circuit Judge.*

The opinion in the above-captioned case filed November 2, 1994 is amended as follows:

1. On page 4, first line under Part I, the words "with her parents" are deleted.

2. On page 15, the second sentence should now read:

> "The harshness of this rule prompted reaction from the federal judiciary and from Congress."

3. The word "nonpecuniary" is deleted on page 20, second line from bottom of page.

4. On page 30, footnote 29 should now read:

> We have alternated in our discussion between the terms "recreational boaters" and non-seamen, and we mean to use the terms interchangeably. We do not mean to intimate that crew members of a vessel such as a racing yacht should necessarily be treated differently than someone in Natalie Calhoun's position. The applicable remedy depends on whether such crew members fall within the Jones Act as seamen.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: November 17, 1994

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and
Yamaha Motor Company, Ltd.,
Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased,

Appellants in No. 93-1737

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC. (D.C. Civ. No. 90-04295)

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN, *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant/Cross-Appellees, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

Circuit Judge

DATED: December 7, 1994

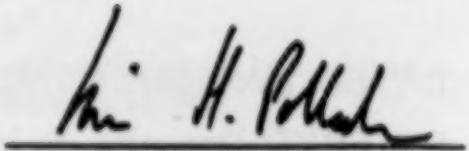
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, et al.	:	CIVIL ACTION NO. 90-4295
v.	:	
YAMAHA MOTOR CORPORATION U.S.A., YAMAHA MOTOR CO. Ltd, et al.	:	

ORDER

1. For the reasons stated from the bench on March 13, 1992, I find that this case falls within the Court's admiralty jurisdiction. Therefore, it is hereby ORDERED that the aspect of Defendants' Motion for Partial Summary Judgment requesting a declaration that Plaintiffs' right to recovery, if any, shall be determined under the law of admiralty, is GRANTED.

2. Resolution of the remaining issues raised by Defendants' Motion for Partial Summary Judgment is CONTINUED pending rebriefing by the parties. The parties are DIRECTED to SUBMIT their additional briefs to the Court by April 3, 1992. Any response to the opposing party's brief shall be due on April 15, 1992.



POLLAK, J.

DATED: March 16, 1992

ENTERED: March 19, 1992

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	Civ. No. 90-4295
v.	:	
YAMAHA MOTOR CORPORATION, USA, ET AL	:	

ORDER

For the reasons given in today's (December 24, 1992) bench opinion, it is hereby ORDERED that the motion of the Yamaha defendants for partial summary judgment on certain damage claims is:

(1) DENIED with respect to plaintiffs' claims for (a) damages for loss of support and services and (b) damages for loss of society; and

(2) GRANTED with respect to plaintiffs' claims for (a) damages for loss of future earnings and punitive damages.

Louis H. Pollak

Pollak, J

DATED: December 24, 1992

ENTERED: December 29, 1992

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	Civil Action
v.	:	
YAMAHA MOTOR CORPORATION, USA, ET AL	:	No. 90-4295

OPINION*

POLLAK, J. June 17, 1993

This is a suit brought by the plaintiffs Lucien and Robin Calhoun, proceeding individually and also in their capacities as administrators for the estate of their daughter, Natalie Calhoun, against the defendants, Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company Ltd., which are respectively a California corporation and a corporation organized under the laws of Japan. Numerous other corporations and partnerships are listed as defendants, but they are not before the court.

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* This is a transcript, which has been slightly edited for clarity, of an opinion delivered from the bench on December 24, 1992.

The plaintiffs are citizens of Pennsylvania, so their claims invoke this court's diversity jurisdiction. In addition, the complaint invokes the admiralty and maritime jurisdiction of this court.

The controversy arises out of tragic events that took place on the 6th of July, 1989 when plaintiffs' daughter, Natalie, was killed in an accident in the waters of Puerto Rico, right off the shore of Palmas del Mar Resort, Humacao, Puerto Rico. Natalie Calhoun and a young friend of hers, both teenagers, had rented a jet ski at the resort hotel at which they were staying with their families. And Natalie, on the rented jet ski, slammed into a vessel in the waters off the hotel frontage, and she was killed.

The suit brought in this court sets forth numerous causes of action, all of them subsumed under the Pennsylvania wrongful death and survival statutes.

The various claims that relate to the two Yamaha defendants, which for purposes of simplicity I'll simply refer to in the singular as Yamaha, sound in negligence as to one count; in strict liability, under Sections 402A and 402B of the Restatement of Torts, as to two additional counts; and, as to implied warranties of merchantability and fitness, two additional counts.

What is before the court is a motion for partial summary judgment. In that motion, Yamaha seeks dismissal of certain damage claims: In particular, Yamaha contends that there is no basis in the legal principles which Yamaha contends are applicable to this case, under which recovery can be had for lost future earnings of Natalie Calhoun, a claim which would be an aspect of the survival action prosecuted on behalf of Natalie Calhoun's estate. Further, Yamaha contends that with respect to the wrongful death claim asserted by the plaintiffs individually, as parents of Natalie, the claimed damages for loss of support and loss of society cannot be sustained as a matter of law. Finally, Yamaha contends that claims for punitive damages, whether under the banner of a wrongful death action or a survival action, cannot be maintained.

Now, an initial question, which in some substantial measure sets the framework for what sources of law govern this

case, is whether this case is properly within the admiralty and maritime jurisdiction of this court or whether it is here only on the basis of diversity of citizenship.

As noted, the first amended complaint invokes this court's jurisdiction on both bases. If it be the case that this case is before the court solely as a diversity matter, then it would appear that the only claims which could be entertained by this court would be claims arising under the Pennsylvania statutes referred to, that is to say, the Pennsylvania wrongful death and survival statutes expressly invoked by the complaint. That is to say, if this case, for jurisdictional purposes, is simply a diversity case, notwithstanding that the complaint invoked both diversity and admiralty, then this case should be treated as any other diversity case in which basically the questions of choice of law, whether as to the substantive ingredients of asserted causes of action or the remedies, including damage remedies that would be assertable, would be questions that would be determined by this court on the basis of its determination of what a Court of Common Pleas of Pennsylvania would do with respect to a case in exactly the same posture being brought there. That is to say, the principles of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), and *Klaxon v. Stentor,* 313 U.S. 487 (1941), would call for this court to follow the rules of the Pennsylvania courts as faithfully as possible.

If this case is also here as an admiralty matter, then, in the view of Yamaha, the Pennsylvania statutes are ousted and the extent of the plaintiffs' claims, both substantively and as a remedial matter, would be determined entirely by reference to the federal maritime standards originating in *Moragne v. States Marine Lines,* 398 U.S. 375 (1970), and developed in later cases, most particularly *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974), *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978), *Offshore Logistics v. Tallentire,* 477 U.S. 207 (1986), and *Miles v. Apex Marine,* 111 S. Ct. 317 (1990).

The plaintiffs respond in three ways. First, they have insisted that this is not a case on the admiralty side of the docket.

Second, plaintiffs take the position that even if it is an admiralty case, as well as a diversity case, the Pennsylvania statutes are applicable and indeed controlling.

And, third, the plaintiffs take the Position that, even if the Pennsylvania statutes do not apply of their own force, the federal maritime claim would embrace the various damage claims challenged by the defendant, Yamaha.

Now with respect to whether this is a case to be treated solely as a diversity matter or to be recognized as an admiralty case, it is, of course, true, that the plaintiffs in drafting their complaint, invoked both elements of this court's jurisdiction. However, the fact that the plaintiffs, as a matter of pleading, may at some point have asserted a particular jurisdictional ground cannot be regarded as estopping them from taking a different position with respect to jurisdiction. Perhaps, to put it another way, this court is not in a position with respect to an issue of jurisdiction to say we must have admiralty jurisdiction even if the plaintiffs now challenge it, since at an earlier stage they claimed it; that is so because, unlike most other issues in litigation, subject-matter jurisdiction is not waivable. If a federal court lacks subject-matter jurisdiction, it is obligated to dismiss, no matter at what stage that deficiency was determined. So I regard the question of whether this case is solely on the diversity side of the docket, or here both on diversity and as an admiralty matter, as a question which is open and properly to be determined.

Having said that, I must add that the very issue is one that I have already addressed in a preliminary ruling, a bench opinion delivered on March 13, 1992. At that time, I decided that this case, involving a collision between a jet ski and a conventional vessel in navigable waters, albeit territorial navigable waters, fell within the admiralty jurisdiction; that seemed to me the necessary implication of the cases beginning with *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1992), that have considered this jurisdictional issue over the past quarter century. Further consideration has not changed my mind.

I conclude that *Sisson v. Ruby,* 497 U.S. 358 (1990), the most recent expression by the Supreme Court that goes to

defining the ingredients of admiralty jurisdiction, is confirmatory of my thinking as expressed last March. And, so too, is the reasoning of the Texas Supreme Court in *Texaco Refining v. Estate of Dau Van Tran,* 808 S.W.2d 61 (Tex. 1991), which the United States Supreme Court declined to review on certiorari. That case is of particular interest because it is one which in certain of its elements is quite like the present case. It was a suit arising out of the death of a person who was crushed by a shrimp boat that was close to a dock, when a great wave, assertedly precipitated by a Texaco tanker going too fast, washed ashore, pushing the shrimp boat against the dock. The case was unlike this one in that it was brought in the state courts of Texas. The state courts at trial and on appeal to the Texas Court of Appeals treated the case as a state law case arising under the Texas wrongful death and survival statutes. The Supreme Court of the United States granted certiorari to the Texas Court of Appeals. The case was not in its first go-round reviewed by the Texas Supreme Court. In granting certiorari, the United States Supreme Court vacated and remanded for further consideration in the light of *Sisson.* On remand, the Texas Court of Appeals praised *Sisson* but concluded that it did not dictate a conclusion that the suit arising out of the death of Dau Van Tran fell within admiralty jurisdiction. And so the Texas Court of Appeals reaffirmed its original affirmance of the judgment for plaintiff based on state law.

The Texas Supreme Court, in the opinion I referred to, 808 S.W.2d 61, reversed and concluded that the case did indeed, pursuant to *Sisson* and also *Foremost Insurance Company v. Richardson,* 457 U.S. 668 (1982), fall within the admiralty jurisdiction.

As a corollary of its jurisdictional determinations, the Texas Supreme Court went on to make determinations as to what was recoverable, taking the case as an admiralty case, and concluded that certain items of damages, particularly loss of society, that had been granted by the trial court and the award of which was sustained by the Texas Court of Appeals were not appropriate. To that aspect of *Dau Van Tran,* we will return shortly. For the moment I refer to *Dau Van Tran* sim-

ply with respect to its holding as to jurisdiction. Agreeing with the Supreme Court of Texas' determination on the jurisdictional side, I see that case as supporting my initial determination that this is an admiralty matter. Confirmatory of this conclusion is a case more recent than my March determination, the decision of the District Court of the Southern District of Florida in *Cantore v. Blue Lagoon,* No. 91-10014 (Sept. 9, 1992). The district court, without directly addressing the jurisdictional question, focused on the scope of the federal maritime claim, which was found to have arisen out of a collision between two jet skis in the waters off Key West, Florida.

I proceed, therefore, on the basis that this is a case on the admiralty side. It is, to be sure, also a diversity case. Given this jurisdictional duality, the first question to be addressed is whether the Pennsylvania statutes invoked by the plaintiffs govern this case.

Here, the plaintiffs place substantial reliance on *Dugas v. National Aircraft Corporation,* 438 F.2d 1386 (3d Cir. 1971), a case decided by the Third Circuit in 1971 following the Supreme Court's decision in *Moragne.* I referred to *Moragne* before but have not noted its importance except to say that it is the initiation of the modern jurisprudence of the federal maritime action for wrongful death.

Moragne overturned the Supreme Court's unhappy decision in *The Harrisburg,* 119 U.S. 199 (1886). That case announced that there is within admiralty no cause of action for wrongful death. A clain for wrongful death in the navigable waters of the United States could come about under the Supreme Court's ruling in *The Harrisburg* only pursuant to a statute establishing a wrongful death claim, a statute which might be the handiwork of Congress or the handiwork of one of the states of the Union. In the absence of such statutory basis, *The Harrisburg* declared that a death, however wrongful, was unremediable if it took place on the navigable waters. That unhappy result was partly remedied in 1920 by the Death on the High Seas Act, 47 U.S.C. §§ 761-768, which created a wrongful death action for deaths on the high seas, which is to say outside the three-mile limit which separates the territorial waters from what Congress has denominated the high seas.

The Death on the High Seas statute provided for recovery for wrongful death with damages generally speaking confined to those of a pecuniary nature.

In addition to that general legislation, Congress passed legislation that addressed particular categories of persons who are in some sense regarded by the law as wards of the United States; seamen are governed by the Jones Act, 47 U.S.C. § 688, which, in effect, replicates for seamen the negligence cause of action and associated remedies, again of an essentially pecuniary nature, that Congress provided in the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59, for railway workers; and the Longshoremen and Harbor Workers Act, 33 U.S.C. §§ 901-950 governing longshoremen.

Moragne, fifty years after the enactment of the Death on the High Seas Act, overturned *The Harrisburg.* The Supreme Court made it reasonably clear that *The Harrisburg* may very well have been wrong when announced but in any event grew only more anomalous with age.

The *Moragne* case, which itself arose in territorial waters, was addressing a claim not governed in terms by the Death on the High Seas Act. The Supreme Court concluded that it had authority to construct a judicial remedy for wrongful death in an area not expressly governed by federal legislation. *Moragne,* in effect, announced a federal maritime action for wrongful death but did not undertake to spell out all the ingredients of that new cause of action.

The first subsequent Supreme Court examination of the *Moragne* cause of action was in *Gaudet* four years later. *Gaudet* dealt with the death of a longshoreman in the territorial waters of Louisiana. The Supreme Court in *Gaudet* decided that an action brought by the decedent's widow[2] — a survival action based on unseaworthiness — was an appropriate claim under the *Moragne* maritime action concept. The decision was greatly complicated by the fact that the decedent had himself sued in his own right, when gravely injured, and the litigation

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2. From the bench, I incorrectly stated that the decedent's "mother" brought the survival action in *Gaudet.* This misstatement would not appear to affect the bearing of *Gaudet* on the present case.

proceeded up through the time of his death. That aspect of duality raised difficult procedural problems; however, it did not bear on the aspects of *Gaudet* that are important for our purposes.

Gaudet, dealing with a case within the territorial waters yet arising out of the death of a longshoreman, not a person with respect to whom Congress had not legislated at all, authorized the widow's wrongful death action under *Moragne* and sustained a damages claim for loss of society. In the course of the *Gaudet* opinion, the Court had occasion to refer, with apparent approval, to cases in which a federal maritime claim was joined with a state claim. An example cited in footnote 24 of *Gaudet* was the Third Circuit's decision in *Dugas*, the 1971 case to which I have referred. In that case, the Third Circuit, pre-*Gaudet*, had sustained a claim based jointly on the Death on the High Seas Act and on the Pennsylvania survival statute. It was a case which arose out of a flight starting in the Bahamas, heading toward Puerto Rico, with the plane lost en route.

Gaudet, on its face, appears to approve of the application of state statutes. *Gaudet* thus might be regarded as encouraging the concept that in a case such as the present one in which there is no directly applicable federal statute — a case arising in territorial waters and not relating to the death either of a seaman or a longshoreman — state statutes, whether wrongful death statutes or survival statutes, could have direct application.

The *Gaudet* case was a case in which the Supreme Court was closely divided, unlike *Moragne*, which was unanimous.

What *Gaudet* augured for the future was a matter of very considerable concern for the bar and for the commentators. In a characteristically brilliant discussion in the leading admiralty treatise, Professors Gilmore and Black, in 1975, just a few months after *Gaudet* had been decided, said: "The *Gaudet* majority may seem to have been somewhat precariously constituted. The reader will be in a better position than the writer is to have an opinion on whether *Gaudet* is a case for all seasons or merely a winter's tale. *G. Gilmore and C. Black, The Law of Admiralty,* 370 (2d ed. 1975).

In the cases subsequent to *Gaudet*, the Supreme Court has narrowed *Gaudet* to the precise field of its own operation. That is to say, subsequent Supreme Court decisions have stressed that *Gaudet* was a case (a) that dealt with a longshoreman's death and (b) that dealt with a longshoreman's death in territorial waters, notwithstanding that the opinion of Justice Brennan for the majority in *Gaudet* placed no weight at all on the locus of the accident and no particular weight on the fact that the decedent was a longshoreman.

With respect to the particular issue of whether — as the Third Circuit suggested in *Dugas*, and the court in *Gaudet* seemed obliquely to acknowledge — a state statute can be joined with an applicable federal remedy, the Supreme Court decisions post-*Gaudet* would appear to have cast some doubt on that sort of a conjunction. Thus, in *Mobil Oil v. Higginbotham*, which was decided in 1978, four years after *Gaudet*, the Court held in an opinion by Justice Stevens, that in a case arising on the high seas — a case not involving a seaman, but arising out of the death of persons in a helicopter crash, offshore and beyond the territorial waters — the relevant recovery was framed by DOHSA, the Death on the High Seas Act, and that precluded any recovery for loss of society, the damage claim recognized by the Court in *Gaudet*. In short, the Court in *Mobil Oil* decided that in a case falling directly within the realm in which congress has legislated, it was not open to the Court to authorize supplementary relief that went beyond the pecuniary damages contemplated by DOHSA.

Mobil oil was followed eight years later, in 1986, by *Offshore Logistics v. Tallentire*. That was a somewhat similar case in that again the deaths were a result of a helicopter crash offshore and beyond the territorial waters. Once again, the basic claim which invoked federal jurisdiction was one under DOHSA and conjoined to it was a claim under the Louisiana wrongful death statute.

The Court in *Tallentire* said the Louisiana statute was without application, and that DOHSA by its own terms was controlling with respect to what relief was recoverable. In particular, a claim for loss of society under the Louisiana wrongful death statute could not be asserted successfully notwith-

standing the so-called "saving to suitors clause" in Section 7 of DOHSA. That clause, notwithstanding the apparent ordinary meaning of its words, did not preserve state causes of action in suits arising on the high seas but simply preserved state court jurisdiction to prosecute the federal claim defined by DOHSA.

Four members of the Court dissented from Justice O'Connor's opinion in *Tallentire*,—but the dissent went to the question of construction of Section 7 of DOHSA and it does not bear directly on the issues before us. There also had been a dissent by two members of the Court in the *Mobil Oil* case, but again the dissent does not really affect the basic line of jurisprudential development addressed here.

The suit brought here is not a suit that relies in any part on DOHSA or on the Jones Act, or on the Longshoremen and Harbor Workers' Act. None of the federal statutes that deal directly with injuries or death in the navigable waters of the United States applies to a case in which the death precipitating the litigation took place in the territorial waters of the United States — that is to say, not on the high seas — and in which the decedent was not a seaman and was not a longshoreman.

Now, given that, is it not arguable that the preclusive thrust of cases such as *Mobil Oil* and *Tallentire* offers no guidance? There is very strong support from eminent authority for the proposition that *Mobil* and most particularly *Tallentire* do not speak to the problem before this court. Professors Wright, Miller and Cooper in Section 3672 of their treatise — I'm referring now to the 1992 Supplement — have this to say in their discussion of *Tallentire*:

> Despite the Court's stated solicitude with regard to forum choice for survivors of those killed on the high seas, the actual holding of Offshore Logistics which addressed a conflict that had developed among the Courts of Appeals as to the substantive effect of the Death on the High Seas Act, resolved that conflict against the interests of most survivors. Prior to Offshore Logistics, several lower courts had held that the first sentence of Section 7 of the Act preserved not only concurrent jurisdiction, but

> also any remedies provided by the state wrongful death statutes, many of which, unlike the federal statute, provide for non-pecuniary losses. Indeed, a literal reading of the statute, which states that it shall not affect the provisions of any state statute "giving or regulating rights of action or remedies for death" would appear to support this view. Nonetheless, in Offshore Logistics, the Court held that when an accident falls within the provisions of the Act, state wrongful death statutes are preempted. Thus, although survivors of a person killed in an accident on the high seas have a choice of forum, they may seek only the limited recovery provided by the Death on the High Seas Act. If the same accident occurs within a marine league from shore, where the Death on the High Seas Act has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for- non-economic losses.

C. A. Wright, A. R. Miller & E. H. Cooper, *Federal Practice and Procedure*, Section 3672 (Supp. 1992) (footnotes omitted).

If Professors Wright, Miller and Cooper are correct — and they almost always are — the plaintiffs in the case before this court would seem to have substantial ammunition in contending for the proposition that at least some categories of nonpecuniary damages can be asserted either under a wrongful death statute or a survival statute. The thrust, nonetheless, of the post-*Gaudet* cases, including *Tallentire*, seems to me to run not in direct holding but in jurisprudential approach contrary to the inference drawn by Professors Wright, Miller and Cooper. That is to say, the Supreme Court's post-*Gaudet* jurisprudence seems to me cumulatively to run *against* a conclusion that state statutes can of their own force have some share in defining what a cause of action may be which arises from a death in the navigable waters, whether on the high seas or on the territorial waters and without regard to whether the decedent is a seaman or a longshoreman on the one hand or a civilian on the other.

In *Mobil Oil*, the Court, speaking through Justice Stevens, recognized that its determination that no claim for loss of society was assertable in a case arising on the high seas,

where DOHSA was applicable, would result in a different and narrower range of potential recovery than if the case had arisen in territorial waters and hence had been governed by *Gaudet*. The *Mobil Oil* Court did not propose to disturb *Gaudet* but it confined *Gaudet* to its geographic bounds. In so doing, the Court noted in footnote 18, at page 624 of 436 U.S., "The only disparity that concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land."

What I think is clear from Justice Stevens' identification of the two "national rules" is that the Court saw not merely the DOHSA claim but the *Gaudet* claim, which potentially was a more favorable one for the plaintiff, as claims of national architecture. The one was a statutory claim, the DOHSA claim. The other, a judicially created one. To that extent, I think Mobil oil carried on what was essentially the central logic of *Moragne* and *Gaudet* themselves — the understanding that the Supreme Court was authorizing the creation of a federally judicially defined cause of action, one which possibly would draw on state law sources but not because state law sources held any direct primacy.

The same jurisprudential thrust, so it seems to me, is to be found in Justice O'Connor's opinion in *Tallentire*. Justice O'Connor starts out the penultimate paragraph of the opinion by saying, "Admittedly in the circumstances of this case, the recognition of a state damages remedy for loss of society would bring respondents' DOHSA recovery into line with the damages available to a beneficiary of a federal *Moragne* maritime cause of action arising from a death on territorial waters. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (holding that awards under the general federal maritime cause of action for wrongful death could include compensation for loss of society). However, the questionable practical significance of this difference in recovery, *see Mobil Oil Corp. v. Higginbotham, supra*, 436 U.S. at 624 and n. 20, is far overshadowed by the potential for serious conflicts between

DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses." 477 U.S. at 233.

Justice O'Connor for the *Tallentire* majority echoes Justice Stevens for the majority in *Mobil Oil* in recognizing that what is in balance is a national statutory claim on the high seas as against a national judicially created maritime action in the territorial waters.

To recapitulate this portion of the opinion, my conclusion is that whatever recovery may be had for a death befalling someone who is not a seaman and not a longshoreman in territorial waters is dictated by a *national* and hence *uniform* federal maritime claim.

Now, having said that, I do not mean to suggest that the fleshing out of what a federal maritime action looks like ignores state law; to the contrary, the Court has made it clear as recently as *Miles v. Apex* — a case that is chronologically subsequent to *Mobil Oil* and *Tallentire* — that the contours of state statutes constitute very important ingredients of the doctrinal data that the Supreme Court looks to in defining the federal maritime action. Thus, in *Miles*, one of the major issues was whether the maritime cause of action could include a survival claim. Without deciding that issue, the Court said that if there were a survival ingredient in a federal maritime action, it would not include a claim for future earnings, and one of the reasons for that conclusion was that only a minority of the states endorse loss of future earnings as an element of survival actions.

Now, to be sure, the *Miles* Court saw other reasons for foreclosing a claim for loss of future earnings, and *Miles* was not a case like ours. The decedent in *Miles* was a seaman and so the Court saw weight in the fact that the Death on the High Seas Act and the Jones Act — one offering geographic definition; and one offering occupational definition — both foreclose noneconomic damages. However, the discipline of the *Miles* Court in considering the bearing of state law in the fashioning of a maritime action — even though in the particular case it concluded that the lesson of state law was not to authorize the particular damage claim because only a minority

of states gave survival recoveries for future earnings — seems to me instructive that in this area of defining a federal maritime action state law is regarded by the Supreme Court as of consequence. At the same time, it should be recognized that what is of consequence to the Court is not the particulars of a particular state statute generated by the legislature of a state which may happen to be reasonably adjacent to the accident.[3] What the Court is concerned about is the generality of state laws and what the majority rules seem to be.

In short, the Supreme Court has recognized state law — not the law of individual states but the various laws of the states of a wrongful death and survival nature — as bearing on its architecture of the uniform national federal maritime action.

Treating the case before us then as a federal maritime action, what are its components? I begin by addressing the question of the recoverability of future earnings. I have pointed out that in *Miles* the Court concluded that there was to be no recovery for future earnings. I have also noted that the *Miles* case is not squarely our case because it did involve a seaman and the Court clearly gave weight, in 111 S. Ct. at 327-28, to the fact that the Jones Act, addressing actions aris-

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3. Having referred to statutes of states that are reasonably adjacent to the accident, I should add that there may seem something anomalous about a contention, which, of course, is central to the plaintiffs' argument in favor of the applicability of Pennsylvania statutes, that they should have application at all to an accident happening right off the beach in Puerto Rico. In a formal sense one might wonder if Pennsylvania could have jurisdiction to legislate about such a matter. At the same time it is to be remembered that in *Dugas* the Third Circuit held the Pennsylvania survival statute applicable to the disappearance of an airplane in the Caribbean en route from the Bahamas to Puerto Rico. One might argue that all states have, subject to federal preemption, an equal right to legislate with respect to matters on the high seas but have less entitlement to legislate with respect to matters in the territorial waters of another state. In this case, the plaintiffs seek to apply Pennsylvania law to what may be characterized as a Puerto Rico accident. But in choice-of-law terms it seems reasonable to say that Pennsylvania's claim of interest here is not markedly dissimilar from its claim of interest in a case like *Dugas*. Its claim of interest arises from the fact that the decedent and her parents were Pennsylvania residents. So in that sense the contours of the damage claim have some importance to Pennsylvania.

ing from the death of a seaman, focused on pecuniary damages but in that framework did not contemplate recovery beyond "... losses suffered during the decedent's lifetime." 111 S. Ct. at 328. So that one ingredient of the *Miles* ruling was one which was anchored in the limitations with respect to recovery for the deaths of seamen that Congress had insisted upon.

However, as I have noted, another aspect of the Court's discussion stresses that loss of future income as an element of a survival action is disfavored by the states as a whole. "In only a few States can an estate recover in a survival action for income decedent would have received but for death .... The considered judgment of a large majority of American legislatures is that lost future income is not recoverable in a survival action. Were we to recognize a right to such recovery under maritime law, we would be adopting a distinctly minority view." 111 S. Ct. at 327.

Justice O'Connor goes on to note that there are good policy reasons for recognizing such a form of recovery but ultimately concludes that it would be inappropriate to include what in effect would be a minority ingredient not endorsed by Congress itself in the enactment of the Jones Act in fashioning the general maritime cause of action.

Given the Court's approach in *Miles*, I conclude that the Court would not in a case such as our own, in which it would be fashioning without statutory assistance a federal maritime claim, include in its survival-action aspects — assuming for purposes of discussion that the Court would conclude that the federal maritime action could include survival-action aspects a claim for loss of future earnings.[4] So, with respect to that claim for damages, I will grant defendant's motion for partial summary judgment.

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4. Given my view that the federal maritime cause of action is perceived by the Court as a claim of uniform national design, the fact that loss of future earnings may be available under the Pennsylvania survival statute, *see, e.g., Bariness v. Gladfelter,* 448 A.2d 1386, 1389 (Pa. Super. 1982), does not provide a basis for permitting a claim for loss of future earnings in this case notwithstanding Pennsylvania's interest in the decedent and her parents.

With respect to the claim for loss of society, once again the defendant, Yamaha, relies heavily on *Miles*. In *Miles*, as we have noted, the Court concluded that a claim for loss of society was not available in an action based on the death of a seaman.

Yamaha also places very heavy reliance on the decision of the Texas Supreme Court, to which I have already referred, and which is one year subsequent to *Miles*, namely *Dau Van Tran*. I have discussed that case in relation to its jurisdictional determination and I have noted that, having concluded that the case should be regarded as an admiralty case, the court went on to determine that, pursuant to *Miles*, "loss of society is not recoverable under general maritime law." *Dau Van Tran*, 808 S.W. at 63.

In short, the Texas Supreme Court drew from *Miles* a rule that would govern the case before the Texas court, which involved, as does the case before this court, the death of someone who was not a seaman as in *Miles*, nor a longshoreman as in *Gaudet*.

In relying on *Dau Van Tran*, Yamaha points out not simply that this is a decision by an appellate court on the very issue presented here. Yamaha also points out that this is a case which the Supreme Court of the United States had already considered, having granted certiorari to vacate the initial Texas Court of Appeals decision that the case was one arising under Texas law. Yamaha's position is that since on remand the Texas Court of Appeals adhered to its original position and then was reversed by the Texas Supreme Court and the United States Supreme Court then denied certiorari, we can take this as implicitly a determination by the United States Supreme Court that the Texas Supreme Court got it right.

Yamaha recognizes, of course, that as a general matter, a denial of certiorari imports no view by the United States Supreme Court one way or the other about the rightness of the decision below. But Yamaha argues with considerable plausibility that the special history of the *Dau Van Tran* case suggests that this is an instance in which the Supreme Court directly intervened once and then must have advertently

declined to intervene a second time because it felt that ultimately the proper result had been reached.

I do not think that this is a conclusion that we are compelled to arrive at. Just as it has been important to the Supreme Court to make clear, in cases following *Gaudet*, that *Gaudet* is a case confined to territorial waters, so it is important for us to recognize, it seems to me, that *Miles* is a case which arose as a seaman's case under the Death on the High Seas Act. Indeed, at many points in the opinion, Justice O'Connor makes plain the contours of the case. The very opening sentence is: "We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death." 111 S. Ct. at 319-20.

Bearing in mind the scope and the limitations of *Miles*, it seems to me that the proper view of the accumulation of cases from *Gaudet* through *Miles*, in each of which the Supreme Court has discussed *inter alia* whether a loss of society claim can be made, is that the Supreme Court has not merely not overruled *Gaudet* within the range of its application but has recognized expressly, both in *Mobil Oil* and in *Tallentire*, that recoveries for loss of society would be appropriate in cases not constrained by statute, that is to say cases unlike cases to which the DOHSA or the Jones Act, both of which are geared to pecuniary recoveries, would apply.

So that, in my judgment, the result arrived at by the Supreme Court of Texas in *Texaco v. Dau Van Tran,* though correct on jurisdiction, is too blunt in equating the case before it with *Miles*. I do not think that *Miles* in terms or by necessary implication governs our case with respect to recovery for loss of society.

Yamaha makes a separate argument with respect to the unavailability of a claim for loss of society. That separate argument is that there can be no claim for loss of society in the absence of a showing of financial dependence by the survivors of the decedent. There is very substantial support for the position contended for by Yamaha. A recent statement of the position which quite comprehensively discusses the antecedent

case law is the decision of the Florida district court to which I have already referred, *Cantore v. Blue Lagoon Water Sports.* Judge King's opinion concludes that absent a showing of financial dependence there can be no recovery within the contours of the federal maritime action for loss of society.

Among the other authorities which can be mustered in support of the result arrived at in *Cantore* is the opinion of the Fifth Circuit in *Miles v. Melrose,* 882 F.2d 976 (5th Cir. 1989), a decision which the Supreme Court reviewed and affirmed in *Miles v. Apex.* The Fifth Circuit concluded that a claim for loss of society could not be asserted within the contours of a federal maritime claim absent a showing of financial dependence.

Given the Supreme Court's affirmance, would it not appear that there is little basis for maintaining a loss of society claim in a case such as the one before this court in the absence of a showing of financial dependence? There seem to me to be two problems with the proposition. One is the point which I have already made in other contexts, that *Miles* is in one important respect not a case like ours, that is to say it is a case involving the death of a seaman. The second point is this: The cases on which Yamaha relies commonly build their conclusion on the proposition that a bright line needs to be drawn to define those cases in which a claim for loss of society can be asserted as against those cases in which such a claim cannot be asserted, and on the corollary proposition that financial dependence is a sensible bright line of separation. The syllogism seems to me to be intrinsically odd. There is no ground for suggesting that the values involved in loss of society — values which are defined by Justice Brennan in footnote 17 of *Gaudet*, values of affection and connection, so multitudinous in the family context — are values that are any more cherished or more clearly demonstrable in circumstances of financial dependence. It may well be that a bright line is called for, but it would strike me that logic would look for that bright line to be drawn in terms of closeness of relationship rather than financial linkage. And, surely, closeness of relationship of parent and child is matched only by the closeness of relationship of spouses

So, recognizing that the strong thrust of the cases is in favor of the contention made by Yamaha, I must conclude that the thrust of the cases has little to support it in the logic of remedies. Moreover, I would point out that, to the extent that *Miles* is regarded as strong authority in favor of the result arrived at in, for example, *Cantore*, in one sense *Miles* could be said at least to suggest neutrality with respect to the significance of financial dependence. As I have pointed out, the Supreme Court in *Miles* affirmed the Fifth Circuit. The Fifth Circuit's ruling with respect to the unavailability of a claim for loss of society was based on its conclusion that such claim could not be made in the absence of a showing of dependence.

The Supreme Court affirmed the ruling but on a different basis. In following a different path to the same result, the Court, although it cannot be regarded as disallowing the Fifth Circuit's logic, can hardly be said to have endorsed it. The availability of a claim for loss of society was announced by the Court in *Gaudet* and has been preserved by the Court in every subsequent case, albeit in no subsequent case has the Court had occasion to sustain a recovery for loss of society, since every one of the cases was distinguishable from *Gaudet*. But, the thrust of the cases, so it seems to me, is to preserve such a claim in a case not governed by statute but rather by a judicially architected maritime cause of action. So I will deny so much of the motion for partial summary judgment as calls for dismissal of the claim for loss of society damages.[5]

The defendant, Yamaha, takes the same position with respect to the claim for loss of support and services as it does with respect to the loss of society claim — namely that, absent a showing of dependence, such a claim is not assertable. Claims for loss of support and services are claims essentially of a pecuniary nature. It may be difficult to measure in dollar terms what a teenager might have contributed in support and

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5. The fact that Pennsylvania law has apparently not yet recognized a parental claim for loss of the society of a deceased child, see *Brower v. City of Philadelphia*, 557 A.2d 48 (Pa. Cmwlth. 1989), *Schroeder v. Ear, Nose & Throat Assoc., Inc.*, 557 A.2d 21 (Pa. Super. 1989), does not affect my conclusion that such a claim is a proper ingredient of the federal maritime cause of action. See *supra* note 4.

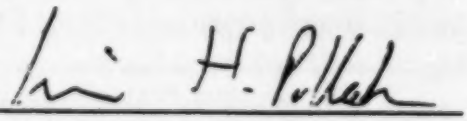
services to her family constellation during the years before she became an adult, but the problems of proof are hardly insurmountable. Suffice it to say that the reasons for retaining such a damage claim — modest as I would expect it to be — seem to me to follow, *a fortiori*, from retention of the claim for loss of society, a nonpecuniary claim.

Finally, there is the question of a claim for punitive damages. There is no authority of which I am aware that persuasively suggests that the federal maritime cause of action designed in *Moragne*, and continued in subsequent cases, would embrace a claim for punitive damages. The Court has preserved, as I read the cases, the nonpecuniary claim for loss of society. I see no reason to suppose that the Court will be disposed to extend the contours of the maritime claim in the massive sense implicated by a punitive damages claim.

Accordingly, I will grant the motion for partial summary judgment insofar as it dismisses the claim for punitive damages.

I have spoken myself out. You have been very patient, all of you, in listening to this much too lengthy exegesis. It has taken a considerable time to work these matters out in my mind, as I found them complex. At the same time, I found them important and I have not wished to rule until the issues were really settled in my mind; that explains — though it may not justify — the fact that this ruling has been so many months in gestation.

I will enter a brief written order, simply recapitulating my rulings, that is to say: granting summary judgment dismissing the punitive damages claim and granting summary judgment dismissing the claim for loss of future earnings; denying summary judgment with respect to the claims for loss of society and loss of support and services.



Pollak, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A.	:	
YAMAHA MOTOR CO. LTD.	:	No. 90-4295

ORDER

For the reasons stated in the accompanying Memorandum:

1. Defendants' motion for reconsideration of the portion of the December 29, 1992 order denying summary judgment with respect to plaintiffs' claim for damages for loss of society is DENIED.

2. Defendants' motion for certification to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b), of the portion of the December 29, 1992 order denying summary judgment with respect to plaintiffs' claim for damages for loss of society is GRANTED.

In granting the motion for certification pursuant to § 1292(b), I find that the order certified for review "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation ..." 28 U.S.C. § 1292(b) (Supp. 1992). The question of law to be reviewed may be characterized as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U.S.A. and

Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The question of law certified to the Court of Appeals is whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover damages for the loss of the society of their deceased minor child.

June 1, 1992

Pollak, J.

ENTERED: June 3, 1993
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A. YAMAHA MOTOR CO. LTD.	:	No. 90-4295

MEMORANDUM

POLLAK, J. JUNE 1, 1993

Defendant Yamaha[1] has moved for reconsideration of that portion of the order of December 29, 1992, which, pursuant to the bench opinion of December 24, 1992, denies Yamaha's motion for summary judgment with respect to the claim of plaintiffs Lucien B. Calhoun and Robin L. Calhoun for loss of society damages arising out of the death of their minor child. In the alternative, Yamaha asks that the questions of law involved be certified to the Court of Appeals for interlocutory review pursuant to 28 U.S.C. § 1292(b).

A.

Plaintiffs contend that the motion should be denied as untimely. Since the order in question was filed on December 29, 1992, strict compliance with Local Rule 20(g)'s ten-day requirement would have entailed the filing of a motion for reconsideration no later than January 8, 1993; Yamaha's motion was in fact not filed until February 12, 1993. Yamaha seeks to justify its delay by pointing out that it "wished to obtain and review the transcript of the hearing and opinion and research in detail the basis for the court's December 24, 1992 ruling in order to precisely formulate the issues for

1. There are, in fact, two defendants, Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. For the sake of simplicity, I refer to them collectively as "Yamaha."

reconsideration." Doc. #75 (Reply Brief in Support of Motion for Reconsideration) pp. 1-2. Since the December 24 bench opinion was an extended analysis of somewhat complex case law, I think Yamaha's feeling that it needed an opportunity to review the transcript of that opinion — a transcript that, doubtless due to the intervening holidays, was not filed until January 13, 1992 — was understandable. Moreover, the delay in filing the motion for reconsideration until February 12 did not in any way impair plaintiffs' capacity to respond to the motion. Accordingly, although as a general matter I think Local Rule 20(g) should be carefully followed, I conclude that, given that the rule is *not* jurisdictional, I will, in this instance, overlook Yamaha's non-compliance (but, at the same time, I would point out to counsel that the better course would have been to move within the prescribed ten days for leave to file out-of-time). The motion for reconsideration will therefore be considered on its merits.

B.

Upon consideration of the motion for reconsideration on its merits, I conclude that it should be denied. The arguments put forward by Yamaha are essentially the same arguments that I addressed, and found unpersuasive, in the bench opinion of December 24, 1991. Yamaha does rely on one Third Circuit case — *DeLoach v. Companhia de Navegacao Lloyd Brasileiro,* 782 F.2d 438 (3d Cir. 1986) — not cited in its prior submissions. That case, however, was unlike the case at bar in salient respects: the plaintiff in *DeLoach* was a child seeking damages for the loss of a parent's society, not vice-versa; moreover, in *DeLoach* the person injured was a longshoreman — i.e., he belonged to a category of persons with respect to whose injuries Congress has legislated, whereas, in the case at bar, the plaintiffs' daughter, whose death occurred in territorial waters (i.e., not within the scope of DOHSA), did not belong to any category of persons dealt with by federal statute. The other case Yamaha heavily relies on but did not previously cite is *Polackwich v. Florida Power & Light Co.,* Case No. 91-4936; Circuit Court of the Thirteenth Judicial Circuit (Florida, Nov. 13, 1992), a state court case which adds little to

Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Texas, 1991), discussed at some length in the bench opinion.

Yamaha's motion does identify a clear error in the bench opinion — namely, that in discussing *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), I described the case as one in which the plaintiff was decedent's mother. In fact, the plaintiff in *Gaudet* was decedent's widow. To rectify the error, I have amended the bench opinion. However, the error is not one that affected my analysis of the bearing of *Gaudet* and subsequent Supreme Court decisions on the case at bar.

Accordingly, I adhere to the views expressed in the December 24, 1992 bench opinion and the order of December 29, 1992.

C.

Notwithstanding my continued adherence to the legal conclusions announced in the December 24, 1992 bench opinion, I think Yamaha is on sound ground in contending that those conclusions are by no means manifestly correct. Even though I rejected Yamaha's arguments, I certainly acknowledge that there is force and considerable case law to support them. Under these circumstances I am persuaded that the December 29, 1992 order which, based on the bench opinion, denied so much of Yamaha's partial summary judgment motion as sought dismissal of plaintiffs' claims for loss of society, "involves a controlling question of law as to which there is substantial ground for difference of opinion. . . . " 28 U.S.C. § 1292(b) (Supp. 1992). Moreover, I am satisfied "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*[2] Accordingly, I have decided that, pursuant to 28 U.S.C. § 1292(b), the appropriate course is certification of the order, in the aspect referred to, to the Court of Appeals, for interlocutory review. Such certification is embodied in the order filed together with this Memorandum.

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2. An authoritative determination by the Court of Appeals of the damages horizon may sufficiently narrow the discrepant hopes and expectations of the parties with respect to a likely jury verdict so as materially to enhance the possiblities of settlement.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A. YAMAHA MOTOR CO. LTD.	:	No. 90-4295

ORDER

For the reasons set forth in the accompanying Memorandum:

1. The certification pursuant to 28 U.S.C. § 1292(b) contained in the order of June 3, 1993, is hereby AMENDED to read as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

2. Proceedings in this court will be STAYED pending whatever action may be taken by the Court of Appeals with respect to the questions certified to that court in paragraph 1 of this Order pursuant to 28 U.S.C. § 1292(b).

JUNE 17, 1993

POLLAK, J.

ENTERED: June 21, 1994
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A. YAMAHA MOTOR CO. LTD.	:	NO. 90-4295

MEMORANDUM

POLLAK, J. JUNE, 1993

I.

Plaintiffs, Lucien B. Calhoun and Robin L. Calhoun, have moved for an amendment to the order of June 3, 1993, which, at the instance of the Yamaha defendants (Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd., hereinafter "Yamaha") certified a question of law to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). The question certified in the order of June 3 was whether "plaintiffs may seek to recover damages for the loss of the society of their deceased minor child," Natalie Calhoun. By their motions, plaintiffs seek to enlarge the certification to include the questions whether plaintiffs may seek to recover (1) damages for the lost future earnings of Natalie Calhoun and (2) punitive damages. Yamaha does not object to enlarging the certification in the manner proposed.

II.

In a bench opinion of December 24, 1992 — an opinion whose determinations were embodied in an interlocutory order of December 29, 1992 — I ruled that plaintiffs could seek to recover loss of society damages and also damages for loss of support and services during Natalie Calhoun's minority, but that plaintiffs could not seek to recover damages for lost future earnings or punitive damages. It is these two latter categories of damages that plaintiffs now wish to have the Court

of Appeals consider concurrently with its consideration of the question that I certified on June 3.[1]

In order to certify these two additional questions I must find, as I found with respect to the question certified on June 3, that (1) with respect to these questions "there is substantial ground for difference of opinion," and (2) an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). I do so find.

(1) As to whether "there is substantial ground for difference of opinion," my views are these:

In the bench opinion of December 24, 1992, I discussed at some length the viability of plaintiffs' claim for damages for lost future earnings. I concluded that, if the Supreme Court were to consider a maritime action presenting the particular features of the case at bar, it would not find a claim for lost future earnings to be cognizable. However, I did not say — and I cannot say today — that the issue is free from doubt. I do think plausible arguments can be made the other way — sufficiently plausible so that it is proper to say that "there is substantial ground for difference of opinion."

The bench opinion dismissed the punitive damages claim with almost no discussion. In moving for enlargement of the certification plaintiffs point to case authority which, they submit, would support the conclusion that a punitive damages claim is cognizable in a maritime action of the kind presented here. While my view that such a claim is not cognizable has not changed, I acknowledge that respectable contrary arguments can be made and that there is no Supreme Court or Third Circuit authority that squarely compels the conclusion I came to in the bench opinion. Accordingly, I am prepared to say that there is, within the meaning of 28 U.S.C. § 1292(b), "substantial ground for difference of opinion."

(2) There is, in my view, no question that authoritative resolution by the Court of Appeals of the two damages questions plaintiffs want certified "may materially advance the ulti-

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1. Assuming, of course, that the Court of Appeals, in the exercise of its discretion, concludes that the question certified on June 3 warrants present review and therefore, decides to "permit an appeal," 28 U.S.C. § 1292(b), from the interlocutory order of December 29, 1992.

mate termination of the litigation." Enhanced assurance as to the character of the legally cognizable damage claims should facilitate possible settlement of the case. And, if a settlement is not arrived at, the ensuing trial would be conducted with a greater degree of certitude as to the issues to be presented to the jury.

If no claim for loss of society damages had been made in this case, I might well not have thought it appropriate to recommend to the Court of Appeals that it consider the two claims — damages for lost future earnings and punitive damages — which are the subject of the pending motion. But, since there is a claim for loss of society damages, and that claim has been certified to the Court of Appeals, considerations of sensible judicial administration argue in favor of the concurrent presentation to the Court of Appeals of all three of these closely interrelated claims.

III.

Accordingly, I will, in an accompanying order, amend the June 3 certification to include the questions presented by plaintiffs. The amended certification will be as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1)

damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

Also, in the accompanying order, I will, pursuant to the joint request of the parties, direct that further proceedings in this court be stayed pending whatever action may be taken by the Court of Appeals pursuant to the amended § 1292(b) certification.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 7, 1993
#B-132

No. 93-8063
LUCIEN B. CALHOUN, et al, Petitioners
v.
YAMAHA MOTOR CORPORATION, U.S.A., et al.
(E.D. of Pa. Civil No. 90-04295 (LHP))

Present: STAPLETON, NYGAARD and SEITZ, *Circuit Judges.*

Petition for permission to appeal from an interlocutory order pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a).

Deputy Clerk 597-1092

See **93-8054, B-131.**

ORDER

The foregoing petition is granted.

This appeal will be consolidated with the appeal at No. 93-8054.

By the Court,

Circuit Judge

Dated: July 16, 1993
Am/cc: JD
WRN
WJT
TAM

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 25, 1993
#B-131

No. 93-8054
YAMARA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD., Petitioners
vs.
LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of NATALIE K. CALHOUN, Deceased,
Respondents
(E.D. of Pa. Civil No. 90-04295 (LHP))

Present: STAPLETON, NYGAARD and SEITZ, *Circuit Judges.*

Petition for permission to appeal from an interlocutory order pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a),

Anthony Infante/ds

DEPUTY CLERK 597-1092

ORDER

The foregoing petition is granted.

Judge Nygaard would deny the petition.

By the Court,

Walter K. Stapleton

Circuit Judge

Dated: July 16, 1993
Am/cc: JD
WRN
WJT
TAM

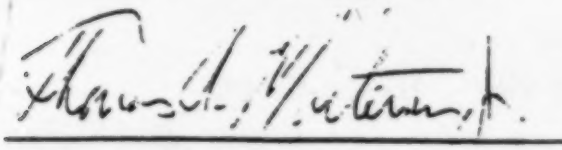
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A., et al	:	
Defendants.	:	NO. 90-4295

STIPULATION TO DISMISS CERTAIN DEFENDANTS

The parties, through their undersigned counsel, hereby stipulate and agree that the following defendants shall be dismissed, without prejudice, each party to bear its own costs and fees:

Palmas Del Mar, A Division of Maxxam Properties, Inc.
Palmas del Mar Company, Inc.
Palmas Yacht Club, Inc.
Marina de Palmas Yacht Club, Inc.
Maxxam Properties, Inc.
Candelero Hotel Corporation
Marina de Palmas Shipyard, Inc.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of NATALIE K. CALHOUN, Deceased,
Appellees/Cross-Appellants

v.

YAMAHA MOTOR CORPORATION, U.S.A.
and YAMAHA MOTOR COMPANY, LTD.,
Appellants/Cross-Appellees

YAMAHA MOTOR CORPORATION, U.S.A.
and YAMAHA MOTOR COMPANY, LTD.,
Appellants/Cross-Appellees

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators
of the Estate of NATALIE K. CALHOUN, Deceased
Appellees/Cross-Appellants

Philadelphia, Pennsylvania
April 13, 1994

BEFORE: THE HONORABLE EDWARD R. BECKER,
Circuit Judge
THE HONORABLE ANTHONY J. SCIRICA,
Circuit Judge
THE HONORABLE CAROL LOS MANSMANN,
Circuit Judge

ORAL ARGUMENT

Barbara M. Ostermann
Official Court Reporter
2722 U.S. District Courthouse
Philadelphia, PA 19106

Proceedings reported by stenography, transcript produced by Computer Aided Transcription

[2]

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JUDGE BECKER: Very well. We will first call Calhoun versus Yamaha. Mr. Dryer, Mr. Masterson.

MR. DRYER: Good morning, Your Honors. I would first like to reserve five minutes for rebuttal.

JUDGE BECKER: State your name for the record.

MR. DRYER: Yes, my name is Jonathan Dryer. I represent the Yamaha defendants in the case below.

JUDGE BECKER: You may proceed. You may assume that we are familiar with the facts and the record and get right into your argument.

MR. DRYER: Thank you, Your Honor. I would like to begin by noting that the *Wahlstrom* case from the Second Circuit, which we cited in our most recent brief, has since had certiorari denied by the United States Supreme Court.

We believe that this case which is factually and legally indistinguishable from the *Calhoun* case, coupled with the Supreme Court's treatment of the Texas opinion in *Dua Van Tran* makes several elements completely clear regarding the general maritime cause of action.

The first of these is that remedy does not vary within the territorial waters according to who the claimant is or is not. A Jones Act seaman, a civilian will receive the same type of remedy for an injury within, or death within the territorial waters.

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The second thing we believe these cases make clear is that the remedy afforded within those territorial waters does not include damages for loss of society, for future wages or for punitive damages.

Prior to the *Moragne* case there was no federal remedy whatsoever for wrongful death within territorial waters. The remedy depended on whether or not a particular state had a statute which would afford that remedy. *Moragne* changed this situation by overruling a case called *The Harrisburg* and created a federal common-law remedy for deaths and situations that were not covered by the federal statute.

JUDGE MANSMANN: Mr. Dryer, could I ask you a policy question?

MR. DRYER: Certainly.

JUDGE MANSMANN: I think this is, frankly, in my own mind, this is what it is perhaps going to boil down to, as to whether we ought to be treating, for want of better words, ordinary citizens as the statutes and the Supreme Court has treated seamen with respect to admiralty law.

MR. DRYER: Yes.

JUDGE MANSMANN: Or should we be treating them as ordinary citizens under state law.

[5]

MR. DRYER: I think the Supreme Court answered that question in the *Foremost* case. What *Foremost* has decided is that pleasure boating, recreational boating activities do come within the ambit of the admiralty jurisdiction. Once within the admiralty jurisdiction, the Court has evinced a clear statement throughout the course of its decisions to provide uniform remedies to all that are injured.

JUDGE MANSMANN: But what is the federal interest in that?

MR. DRYER: The federal interest is the protection of maritime trade. For example, if you turn the facts of this case around and have a boat striking the jet ski rather than vice-versa, you then have a situation where you are talking about the liability of a vessel in Congress— in commerce, I'm sorry.

You are talking about the effect on interstate commerce or admiralty jurisdiction, you are talking about the entire system. The federal interest in uniformity of remedy and in uniformity of enforcement is the protection of maritime commerce and the providing of a predictable remedy for any type of action or injury which may result from the operation of that admiralty—

JUDGE BECKER: And you would suggest that this patchwork of Supreme Court cases in the wake of *Moragne* gives you anything predictable—

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MR. DRYER: I believe it does.

JUDGE BECKER:— especially when you look at the peregrinations of Judge Pollak's decision on the one hand, on

the other hand a brilliant man, he taught me federal jurisdiction, back and forth, back and forth, that is clear?

MR. DRYER: That's what— I believe they are trying to make it clear throughout the series of decisions which have ensued.

JUDGE BECKER: Have they succeeded?

MR. DRYER: I believe they have, Your Honor.

JUDGE BECKER: Really? This is a simple case.

MR. DRYER: I believe it is. If you go back to *Moragne,* back to the original decision which established the general maritime cause of action, at page 1788 of *Moragne* in the Supreme Court Reporter page 401 of the same decision in the U.S. Reporter, the Court says as follows: "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime"—

JUDGE MANSMANN: They were talking about a seaman.

[7]

MR. DRYER: They were, they were talking about a longshoreman in *Moragne,* a Seriaki seaman, yes.

JUDGE MANSMANN: Exactly. So my point is aren't there very different public policies that protect ordinary consumers, for example, against a manufacturer that would be at least as strong as your public policy of the federal interests in interstate commerce where you have an ordinary consumer and you have a vessel, seaworthy, a vessel on navigable waters?

MR. DRYER: I think the Court has also spoken to that concern in its treatment of the *Dua Van Tran* case. For example, *Dua Van Tran* was a civilian. The case was originally proceeded and tried under Texas State law pursuant to the interest that Texas supposedly had in the protection of its citizens. Remedies were awarded under state law, under the state law of Texas, and the intermediate Texas Appeals Court affirmed that decision.

The Supreme Court granted certiorari of the intermediate decision, looked at the situation, and instructed the Court to reconsider its decision in light of *Sisson versus Ruby. Sisson versus Ruby* is a products liability case in which the Court extended admiralty jurisdiction to products liability.

When the case came back to the Texas Court of Appeals,

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they allegedly reconsidered under *Sisson versus Ruby,* but reached exactly the same result. That case then went up to the Texas Supreme Court. The Texas Supreme Court said, no, you can't do this, you cannot apply your interest under state rules. Where federal maritime jurisdiction is applicable, as it is here, you have to afford the remedy under maritime jurisdiction. State laws, state interests must fall to the national uniform—

JUDGE MANSMANN: In *Dua Van Tran* where did the incident occur, the accident?

MR. DRYER: It occurred within territorial waters. The facts of the case involved an individual who was attempting to free a boat and a wake, I believe, from a Texaco tanker came by and swamped the boat and crushed this individual.

JUDGE MANSMANN: And what was the public policy argument there?

MR. DRYER: The public policy is the uniformity of remedy within admiralty that state concerns bow to a uniform system of maritime justice.

I think it is important to note from the onset with *Moragne* that the Court wasn't saying they are going to come in and establish a certain minimum standard of recovery that is going to exist in territorial waters.

[9]

What they were saying is that they are going to come in and establish the standard of recovery. And going back to what Judge Becker had questioned regarding whether this patchwork system that we have before us is effective and predictable, I think it is becoming that way.

Moragne didn't leave the future Court without guidance. It said you look to DOHSA, you look to the Jones Act and you look to the collective jurisprudence of the individual state. You don't look to any one individual.

JUDGE BECKER: You mean we engage in counting, the majority rules?

MR. DRYER: I don't know that it's a strict count.

JUDGE BECKER: What if it is 26 to 24?

MR. DRYER: The most recent discussion from the Supreme Court in that area would have occurred in *Miles* regarding loss of future wages. In *Miles* the Court said we have a situation where there's only three, and there may be some others, three states that allow unlimited future wages up to the point of the decedent's normal expected death.

What they said is that we are not going to adopt this particular element of damages in the absence of a compelling [10]
mandate, such as the Supreme Court had originally seen in *Moragne.*

JUDGE BECKER: Most states have punitive damages, yet you wouldn't go by the majority rule on punitive damages, Mr. Dryer.

MR. DRYER: The first source, Your Honor, the first source of recovery is not the state statute. The first source is a goal for uniformity with DOHSA and the Jones Act.

JUDGE BECKER: But DOHSA and the Jones Act have got utterly nothing to do with this case which didn't involve a seaman, which didn't involve an unseaworthiness claim, and which happened within territorial waters.

MR. DRYER: DOHSA does not involve a case which happens within territorial waters, that is correct.

JUDGE BECKER: That is right. The Act doesn't apply.

MR. DRYER: Well, that is correct, Your Honor. However, the *Moragne* Court specifically stated repeatedly that DOHSA should be the primary model, the primary model for the fashioning of the general maritime remedy. DOHSA itself does not permit punitive—

JUDGE BECKER: With Judge Mansmann's permission, *Moragne* is also a limited case. Why should we apply *Moragne* beyond its factual scenario?

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MR. DRYER: Because the intent of *Moragne* was to create a uniform remedy within the three-mile period for maritime death.

JUDGE SCIRICA: But for civilians?

MR. DRYER: For everyone.

JUDGE BECKER: Where does it say that? That is not—

JUDGE SCIRICA: Where does it implicate civilians?

MR. DRYER: It says, the specific holding of *Moragne* is that they desire to create a uniform remedy, a uniform remedy within territorial waters. Does it say for everyone? No, but the subsequent interpretations of the case have recognized that it applies across its boundaries.

Miles, for example, did not limit that aspect of *Moragne* to its facts. It did limit other aspects of other cases to their facts. But as the decisions have evolved, there is a clear pattern from the Supreme Court and from other Circuit Courts, such as *Wahlstrom,* which have suggested that there is a uniform intent for remedy within those three miles regardless of who was injured.

JUDGE SCIRICA: *Miles* involved a seaman.

MR. DRYER: Yes, it did.

JUDGE SCIRICA: All right. What is there, anything in

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any Supreme Court decision that carries this over to a civilian?

MR. DRYER: Expressly, *Miles* involves a seaman. *Miles* does not expressly state that it should go beyond that, however it is interesting to note the holding of *Miles* with regard to loss of society, and the *Gaudet* case which was being discussed beforehand, the Court held in *Miles* that a seaman's recovery under the General Maritime Act or the general maritime remedy cannot include loss of society.

The Court also held that a general maritime cause of action does not include loss of future wages. Now, they put the limitation on the initial element of damages, the loss of society, because that was to distinguish from *Gaudet.* They did not put the same limitation on the loss of wages remedy.

That coupled with the treatment of *Dua Van Tran* which was a civilian, clearly a civilian, and when the case went up the first time, the Texas Court was given specific instructions as to how to deal with it. After they dealt with it in the fashion consistent with maritime law, it was taken back up and the Court declined to hear it again.

JUDGE MANSMANN: May I ask a question? I can appreciate that if this lawsuit were as between the family of [13]
the young girl and the ship in interstate commerce, then we have the public policy that you have explained to us.

But let's suppose there were no ship involved at all, and this is the jet ski, only the jet ski that goes down or whatever.

MR. DRYER: It explodes.

JUDGE MANSMANN: It explodes. How is interstate commerce affected so that the same public policy grounds would apply there?

MR. DRYER: The same public policy grounds might occur in the same fashion that might arise, if for example, an airplane comes down and crashes on an airport, the airport would be closed down. If you had a maritime death—

JUDGE MANSMANN: But if the airplane comes down over navigable waters, the Supreme Court has said, no, we don't need to look at those kinds of things.

MR. DRYER: I'm sorry, I misled you with that analogy.

JUDGE MANSMANN: But my point is we have situations where accidents or something occur over navigable waters or within territorial waters and the Supreme Court has said, no, this is not a case such that the maritime laws ought to apply, admiralty jurisdiction doesn't apply.

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MR. DRYER: I again apologize because I did mislead you with that. My point with the analogy of the accident is that if you have a situation where the jet ski, for whatever reason, is involved in an accident, you may very well have a closure of the harbor while the investigation is concerned. You may very well have a detention of, you may very well have a detention of another ship, witnesses, this, that or whatever.

You may also have a situation, and *Foremost* recognizes that pleasure boating is not to be treated differently than commercial boating, however, you may have a situation where these types of items are being used within the realm of commercial boating as well.

JUDGE MANSMANN: But why should the interest in interstate commerce take precedence over the situation where we have a product, essentially a product liability case against the manufacturer because the product didn't do what it was supposed to do, allegedly?

MR. DRYER: Allegedly, yes.

JUDGE MANSMANN: Why in those circumstances should the public policy— I don't know how the public policy for interstate commerce assists at all or should take precedence over the states' interests and their own citizens getting what under state law is deemed to be the just result.

[15]

MR. DRYER: It is not interstate commerce that is affected; it is admiralty.

JUDGE MANSMANN: I'm sorry, admiralty, yes.

MR. DRYER: I said the same thing before. The Court has ruled consistently that a uniform system of federal admiralty law is necessary.

JUDGE MANSMANN: You were talking about seamen, I'm sorry.

MR. DRYER: Go ahead, I'm sorry.

JUDGE MANSMANN: But in all those cases they were talking about seamen.

MR. DRYER: Well, not in all of them. In all other ways.

JUDGE MANSMANN: There was the Death on the High Seas Act. That is a different story. Congress has clearly spoken there. That is because when you are on the high seas you are not in the territorial waters of a particular state. So Congress has deemed uniformity critical there.

MR. DRYER: I believe the Court has also deemed uniformity critical within the territorial waters for the reasons set forth initially in *Moragne* and continuing right through the decisions that we have cited in our brief.

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JUDGE BECKER: But the flip side of Judge Mansmann's question which she didn't press you on, is the question of the state interest. Is there not a state interest in this kind of case?

MR. DRYER: I think there may very well be a state interest. I would disagree that it is Puerto Rico— that it is Pennsylvania in this case, and we could address that issue.

JUDGE BECKER: We are not, that is really not before us at this juncture.

MR. DRYER: That is correct. I think certainly there is a state interest.

JUDGE BECKER: But what you are doing, Mr. Dryer, is you are subtly transmogriphying uniformity into preemption.

MR. DRYER: Well, I think that is correct.

JUDGE BECKER: But the question is whether that is justified by the cases. *Tallentire* clearly intimated as I understand it, that federal law did not preempt the whole field of maritime tort remedies.

MR. DRYER: I think—I'm sorry.

JUDGE BECKER: Well, indeed it continued, it didn't approve or didn't disapprove, but it didn't disapprove the practice of applying state survival statutes to cases involving death on the high seas, and *Miles* suggests the survival, state

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survival statutes operate. How do you respond to that?

MR. DRYER: I don't think *Miles* suggests that in individual states the survival statute applies at all. I think what *Miles* suggests is that the federal—is that there may very well be a federal survival component to the general maritime action which includes to the extent not repugnant with some of the other statutes, the certain elements of survival damages such as pain and suffering.

I think the Court recognizes that there may very well be a limited survival component, but it is not picked and chosen from any particular state law.

JUDGE BECKER: In *Dugas* we held that a Pennsylvania statute may apply directly in a DOHSA claim, did we not?

MR. DRYER: Yes, we did. And I believe that in *Dugas, Dugas,* number one, *Tallentire* would cast some severe doubt on that, because *Tallentire* is essentially the same case. It is a DOHSA case in which a state remedy is coupled.

JUDGE BECKER: So you are suggesting that this is like the *Clearfield Trust* line of cases where state law is a component of federal law.

MR. DRYER: I apologize, I am not familiar with *Clearfield Trust* but—

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JUDGE BECKER: But that line of cases, *Kimble Trust, Clearfield Trust,* and Kimble allows, as I understand it, individual state laws to be incorporated into state law so as to give play to state interests.

MR. DRYER: No, I would suggest that that is not the case at all. I would suggest that as I believe in *Tallentire* the Court suggests that there is a reverse theory doctrine involved, in that although state courts may hear admiralty cases, they cannot apply state remedies. They must apply admiralty remedies.

JUDGE BECKER: Excuse me, that is what the— you said the Second Circuit?

MR. DRYER: No, I believe that is the Supreme Court in *Tallentire.*

JUDGE BECKER: I have yet to find a Supreme Court case which says that permitting state statutes to apply concurrent with *Moragne* and thereby letting the state interest have play is violative of any principle announced in any Supreme Court case, and I would like you to tell me— the red light is on— but I would like you to cite to me where, in what Supreme Court case that possibility is ruled out.

MR. DRYER: There is no express overruling of that possibility in a Supreme Court case.

JUDGE BECKER: So it is open.

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MR. DRYER: I don't believe it is open under the spirit and intent of—

JUDGE BECKER: But if we disagree with the Second Circuit and create a split, then you get a chance to argue before the United States Supreme Court, Mr. Dryer.

MR. DRYER: That is a real possibility, Your Honor.

JUDGE BECKER: Okay. We will hear from Mr. Masterson.

MR. MASTERSON: May it please the Court, my name is Thomas A. Masterson, Junior. I represent the plaintiffs in this case, Lucien B. Calhoun and Robin L. Calhoun. They are the parents of Natalie K. Calhoun.

I would like to reserve three minutes for rebuttal, Your Honor.

JUDGE BECKER: Well, do you have a cross appeal?

MR. MASTERSON: Yes, sir.

JUDGE BECKER: You have a cross appeal, okay.

MR. MASTERSON: Judge Becker—

JUDGE BECKER: Of course, you do have a cross appeal, obviously.

MR. MASTERSON: You asked the question what is clear

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in this area and I suggest to you there is not a lot that is clear. But I would like to spend a couple of seconds just outlining for you what I believe is clear in this area, which I think provides an analytical framework here that allows this Court to come to the conclusion that the plaintiffs have asserted is the correct conclusion in this case.

Number one, it is absolutely clear that Natalie Calhoun was not a seaman, therefore, the Jones Act and the damages limitations do not apply to this case.

Number two, Natalie Calhoun was killed in an accident within the territorial waters of the Commonwealth of Puerto Rico, therefore Death on the High Seas Act and the limitations on damages set forth in that statute do not apply.

Number three, the Death on the High Seas Act, and numerous Supreme Court opinions recognize the importance of allowing state statutes to apply in the admiralty context which is exactly the argument that we are advocating here.

Number four, the Supreme Court of the United States has consistently looked at states' interests and effected a balance

between admiralty and this concept of "uniformity in admiralty" and the power of the states to regulate conduct within their jurisdiction.

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And when I was preparing for this argument yesterday, I came across a recent United States Supreme Court case which I would like to bring to your attention today which was decided on February 23, 1994, after we had filed our last brief. The name of the case is *American Dredging Company versus Miller,* and it appears at 127 Lawyers Edition 2nd, 285; 114 Supreme Court 981.

I suggest to you that this case directly supports the arguments that we have been advancing in this case regarding this context of uniformity in admiralty which I suggest to you has not been fully understood by the lower courts and which has been seized upon as an incantation to justify a result that really doesn't have any justification—

JUDGE MANSMANN: Tell us the facts of this *American Dredging.*

MR. MASTERSON: This case which was decided in February 1994, involved a maritime accident which occurred on the Delaware River here, just coincidentally. The plaintiff was a resident of Mississippi who was initially treated in this area, then went back to Mississippi and convalesced.

JUDGE MANSMANN: A seaman?

MR. MASTERSON: A seaman, that is correct. For some

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reason which is not clear in the case, he elected to file a Jones Act action in the Louisiana State Court.

The defendant in the case, which was a Pennsylvania corporation, moved to have the case dismissed invoking the maritime and long-accepted doctrine of forum non conveniens.

Apparently there was a Louisiana State statute that specifically said that in maritime cases filed in Louisiana State Court, we are not going to allow the federal doctrine of forum non conveniens to take away cases from our Court, so we are not going to pay any attention to that.

The United States Supreme Court in a decision by Justice Scalia, permitted the application of that Louisiana State stat-

ute and said that it has, it did not interfere with important principles in admiralty, and he specifically addressed this issue of uniformity in admiralty which is the issue that the defendant in this case and in the *Wahlstrom* case and other cases say dictates the result that plaintiffs are entitled to no damages, and that no specific state wrongful death statute or survival statute may be invoked.

On page 296 of 127 Lawyers Edition 2nd Justice Scalia talks about this doctrine of uniformity in admiralty and Judge Becker— excuse me— talks about this preemption argument.

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He says: "The requirement of uniformity is not, however, absolute. As *Jensen* itself recognized, it would be difficult if not impossible to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied."

And then he goes on to quote from a case called *Romero* which we have quoted in our briefs. A later case describes to what breadth this some extent extends. Quoting from *Romero:* "It is true that state law must yield to the needs of the uniform federal maritime law when this Court finds inroads on a harmonious system, but this limitation still leaves the states a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions have been upheld when applied to maritime causes of action."

That is exactly what the plaintiffs are advocating in this case.

JUDGE BECKER: What was that last sentence again, Mr. Masterson?

MR. MASTERSON: Starting from the beginning?

JUDGE BECKER: No, the last sentence.

MR. MASTERSON: State remedies for wrongful death

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and state statutes providing for the survival of actions have been upheld when applied to maritime causes of action.

JUDGE BECKER: Does he have a cite to that?

MR. MASTERSON: Yes, he is citing to a case called *Romero versus International Terminal Operating Company,* 358 U.S. 354, 373 to 374, 1959.

JUDGE MANSMANN: Can we talk about the public policy argument that we have, that I was discussing with Mr. Dryer. Why should individual state interests take precedence over a federal interest in seeing that the waterways are always open, are moving appropriately and quickly, and commerce is adequately and uniformally handled?

MR. MASTERSON: Your Honor, primarily because Congress, which is the body of Government which is empowered with the law-making power, has specifically decided to allow the states to continue to regulate conduct within their territory. Congress had had many occasions to enact laws that would control all of the conduct within the waterways within the states and has elected not to do that.

The Death on the High Seas Act, a number of times has come up in Congress for amendment to extend it into state territorial waters, and every time it has been turned down. [25]
There has been a consistent theme in Congress to protect the operation of state statutes within state territorial waters.

I think the Supreme Court has consistently acknowledged that interest. And that is what is happening here.

JUDGE SCIRICA: It is pretty hard to define a policy simply by reason of the fact that Congress hasn't passed a law unless you have, unless you can point to Senate hearings or Senate reports or Congressional reports.

MR. MASTERSON: Well, clearly the reports, Congressional hearings and reports that were prepared in connection with the Death on the High Seas Act reflect the great sensitivity of Congress to the powers of the states to control conduct within their territories.

JUDGE SCIRICA: Did they specifically say that state wrongful death and survival actions should be maintained for civilians within territorial waters?

MR. MASTERSON: They specifically say that they do not want the federal government to take away the rights of the

states to provide wrongful death recoveries for conduct occurring within the states, yes, that is correct.

One more point if I may on this opinion, Supreme Court [26]
opinion, because I think it is very timely. Justice Stevens wrote a concurring opinion which again focuses on this concept of uniformity in admiralty, and he makes the exact point that I am making here.

This is on page 302 of 127 Lawyers Edition 2nd. "When relevant federal legislation indicates that Congress has opted to permit state diversity in admiralty matters, a finding of federal preemption is inappropriate. Just as in cases involving non-maritime subjects, c,e.g., Cipollone, we should not lightly conclude that the federal law of the sea trumps a duly enacted state statute."

In our briefs we point out the long history in admiralty in the Supreme Court of referring to and incorporating into the law of the sea relevant state statutes. I suggest to you that in the *Dugas* case in the Third Circuit and in the *Scott versus Eastern* case, this Circuit has done exactly what ought to be done in admiralty cases throughout the country.

The tools for the results that the plaintiffs are advocating have already been decided in this Circuit. I suggest to you that the approach taken by the Third Circuit in the *Scott versus Eastern* case is absolutely intellectually the best approach to take in a case like this.

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There the Court examines the relevant state interests of the parties actually involved in the lawsuit. As you may recall, that was an accident involving a plane crash in Boston Harbor. The plaintiff and decedent was a Pennsylvania resident. The accident happened in Boston.

At that time the general rule in maritime cases was that the law of the site of the accident applied.

Massachusetts wrongful death statute limited damages to ten thousand dollars. The plaintiffs in that case advocated and the Third Circuit accepted a conflict of laws approach which at that time, which was 1967, was just evolving in the cases, and that was based upon the *Griffith* case, which allowed the Court

instead of following the law of lex loci delicti, to look at the interests of the people and the interests involved in the particular incident.

In that case, they concluded that the law of Pennsylvania should be applied.

JUDGE SCIRICA: Let me ask you something that Mr. Dryer said. He mentioned to us, he said consider the situation where a vessel, let us say a commercial vessel struck the jet ski in this case, and the young girl was killed. Same analysis?

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MR. MASTERSON: Yes, I think so, Your Honor, I don't see any basis for distinguishing it. And I think that the Third Circuit's decision in *Scott* was a very forward-thinking decision at the time, and is one which makes eminent good sense today.

JUDGE MANSMANN: May I ask, do the Supreme Court cases equate maritime with admiralty or does the word maritime simply mean it takes place on water?

MR. MASTERSON: That is my understanding. The actual, literal definition of admiralty versus maritime, I think there is a subtle distinction, which I can't explain to you, but the Court does basically seem to use them as the same terms.

JUDGE MANSMANN: I am wondering given Judge Scirica's question to you, if this were reversed a little bit, and the ship actually hits the jet ski, if the cause of action is based purely and simply on cross liability, why couldn't, one, for example, state law apply, but if it is based on something that is intrinsically admiralty or maritime—

MR. MASTERSON: Right.

JUDGE MANSMANN:—why within the same lawsuit couldn't those, that law or remedies apply?

MR. MASTERSON: They could, and I think that the term depecage—

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JUDGE SCIRICA: That is a different answer than you gave me.

MR. MASTERSON: That is a better answer.

JUDGE SCIRICA: Well, which answer, you are saying that is a better answer.

MR. MASTERSON: Well, I like—

JUDGE MANSMANN: Could we look at the public policy.

MR. MASTERSON:— Judge Mansmann's analysis.

JUDGE MANSMANN: What are the public policies there, though, that are at stake?

MR. MASTERSON: Well, I don't see any public policy problem with doing what this Court did in *Scott* or doing what this Court did in *Dugas* or doing what the plaintiffs are advocating in this case. There is no public policy problem with acknowledging the concept of federalism and allowing state interests to be acknowledged in the admiralty setting.

It has been done in Supreme Court cases in admiralty for over a hundred and fifty years. The repeated theme in the cases is that acknowledging a state interest in admiralty does not have any negative effect on the interest of the federal government, on federal maritime system or on this "doctrine of uniformity." The *Moragne* case, which is as I said in the brief the seminal case in this area and a very important case [30]
for you to look at, was simply the culmination of a number of cases in the Supreme Court.

When you put it in context, it is very clear that the *Moragne* case was decided for one reason and one reason only, and that was to provide a uniform right of action for seamen to take advantage of the warranty of seaworthiness. It had absolutely nothing to do with damages.

And that is clear in *Moragne* and in the later cases. There has never been in a Supreme Court case a finding that "uniformity of damages" is an important federal or maritime interest when it relates to accidents occurring within state territorial waters.

The Supreme Court has always been cognizant of the rights of the states to control actions within their state territories out of comity.

JUDGE SCIRICA: I am trying to understand your position here. Commercial vessel and a jet ski hit within territorial waters. Commercial vessel claims that the jet ski was at fault and sues them for property damage. What law applies there?

MR. MASTERSON: I am hesitating because in a property damage context, I am not sure.

JUDGE SCIRICA: Okay, let's say somebody gets injured on the vessel— it's absurd, I realize that.

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MR. MASTERSON: Yes.

JUDGE SCIRICA: But if it's a personal injury, then where are we?

MR. MASTERSON: Well, if it's a seaman, it is the Jones Act. If it is not a seaman, it could be the law of the territory where the accident occurs.

JUDGE BECKER: Doesn't *Kermarec* give a passenger a general maritime remedy?

MR. MASTERSON: A negligence remedy.

JUDGE BECKER: Negligence remedy.

MR. MASTERSON: Yes.

JUDGE SCIRICA: You raised some interesting questions here. I am just trying to figure out how it all sorts out when we get different factual situations.

MR. MASTERSON: I understand the permutations are endless, but one thing that is consistent here has been the Supreme Court and Congress's acknowledgment of the rights of the states to control conduct within state territory and the deference to the invocation of state wrongful death and survival statutes. That has been consistent throughout. Even in *Moragne* at the end of the opinion where the Court says, well, today we are establishing this new right of action which will allow seamen to take advantage of the wrongful death— of the unseaworthiness warranty. We are not going to be too

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concerned about damages, because there are years of experience that you can draw upon, and they point to the Death on the High Seas Act, the Jones Act and the multitude of state statutes which have been incorporated into admiralty for decades.

When you look at that case in the context of the previous cases, it is very clear that what they were referring to was the centuries-long tradition of incorporating into admiralty the

specific state statutes that were relevant to the incident in question, just as the Third Circuit did in the *Scott* case.

JUDGE BECKER: Thank you, Mr. Masterson, we will take you back on rebuttal. You reserved some rebuttal time, Mr. Dryer.

MR. DRYER: Yes. I have to confess I haven't read the *American Dredging* case, but it sounded very much like a savings to suitors case.

JUDGE BECKER: We will give each of you a week to give us a memo on the *American Dredging* case and the import of it.

MR. DRYER: Thank you.

JUDGE MANSMANN: In letter form.

MR. DRYER: As for as *Scott versus Eastern Airlines* is concerned, at the time *Scott* was decided there was no federal

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law to preempt the determination of state law. You had a straight conflict of law case between the laws of Massachusetts and Pennsylvania. I submit to you you don't have that any more after *Moragne.*

The other question that was asked was why not a product liability action under state law. I think *Sisson versus Ruby* addresses that, that contention squarely. *Sisson* involved a case in which a clothes dryer, I believe it was, malfunctioned on a pleasure boat which was docked in a marina and burned the entire marina down.

The attempt was made to pursue a products liability action under state law. The Court held that that was in fact a federal maritime admiralty action.

JUDGE MANSMANN: Which Court was this?

MR. DRYER: This was the Supreme Court in *Sisson versus Ruby.* I believe it is cited in our brief. As far as why *Moragne* would not have advanced beyond specific or made a statement that it applies beyond longshoremen, they made the statement that we will leave it to others to determine who the beneficiaries will be and what the damages shall be.

Twelve years later or whenever when *Foremost* was decided, pleasure boaters were brought into the ambit of the maritime jurisdiction.

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I believe that is all I have, and I thank you for your time.

JUDGE BECKER: Mr. Masterson, you reserved some some rebuttal time.

MR. MASTERSON: I did. Due to the brevity of Mr. Dryer's rebuttal, the only thing I would comment on is the *Sisson* case was a jurisdictional case. It had nothing to do with what damages should apply. It was simply limited to whether that incident should be within admiralty jurisdiction. And that is the point that I again would like to focus on.

Just because something is determined to be within maritime doesn't mean that all the state interests suddenly disappear. And that is the theme that has been carried throughout the Supreme Court cases and it is a theme that I think this Court should carry through as it did in *Dugas* and *Scott versus Eastern*, and take a look at the interest of the parties involved in the issues in dispute here, which are the damages, and determine how that should be resolved.

We suggest that a standard diversity conflict of laws analysis should be done, and that when that is done, the law of Pennsylvania is the most appropriate law to absorb into this maritime cause of action.

JUDGE MANSMANN: How would we write this given

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Sisson? We would say this is an admiralty case?

MR. MASTERSON: Yes, that has already been determined and that is not before you at the moment. We argued that in front of Judge Pollak. We argued that a jet ski should not be considered a vessel for the purposes of maritime jurisdiction, and he ruled against us on that, and that issue is not before you today.

But just because it is in maritime, as I say, does not mean that state interests disappear. Again, Congress and the Supreme Court have consistently acknowledged the primacy

of the states with regard to conduct occurring within their boundaries and actions affecting citizens of the states within territorial waters.

THE COURT: Thank you, Mr. Masterson.

MR. MASTERSON: Thank you.

(End of oral argument)